THE CLASSICS OF INTERNATIONAL LAW

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De Jure Naturae et Gentium Dissertationes

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Vol. II. A Translation of the Text, by John Pawley Bate, with Index of Authors Cited.

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Dissertations

on

The Law of Nature and of Nations

BY

SAMUEL RACHEL

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From the press of Joachim Reumann, University printer,
In the year 1676.

VOLUME TWO

THE TRANSLATION

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INTRODUCTION.

In his *Elementorum jurisprudentiæ universalis libri tres,* published in 1660, Samuel von Pufendorf denied the existence of a positive *jus gentium* (Law of Nations), distinct from the *jus naturale.* He maintained therein that States were universally subject to the Law of Nature only; in addition there were, of course, rights based upon treaties, and also customs observed between civilized States, but (said he) these treaty rights were valid only between the States that had concluded the treaty, and a State might at any time renounce these customs; such conduct would admittedly expose the State to evils—such as reprisals and censure—but Pufendorf does not seem to attach great importance to these evils, and (as he by means of a few illustrations proceeds to show) they have at different times failed to deter governments and generals. This doctrine, which in 1660 Pufendorf, as a young scholar, had expounded in his *Elementa jurisprudentiæ universalis* (Lib. I, definitio 13, §§ 24-26), he restated in 1672 in his great work *De jure naturæ et gentium* (Lib. II, cap. 3, § 23); and we may readily imagine that the authority of the famous writer won many adherents to his teachings. His doctrine, however, was not only erroneous; it was dangerous. According to it, it would not be possible for a custom in harmony with the actual progress of civilization gradually to assume the force of law; it failed, moreover, to recognize (1) the possibility of extracting a general principle of law from important stipulations recurring more and more frequently in international treaties, and (2) the fact that treaties, directly based upon generally accepted legal principles and concluded between the more civilized nations, will also by degrees be considered as authoritative by other and non-signatory nations, a phenomenon which, to be sure, first became conspicuous in our own day. Accordingly, to attack this doctrine, which favored arbitrariness and based the Law of Nations solely upon the principles of Natural Law established by *à priori* reasoning, and at the same time to show that by the

side of the *jus naturæ* there also exists a positive Law of Nations —this was a signal service. It was left to Rachel to render that service.[1]

Samuel Rachel[2] was born April 6, 1628, in Lunden, a small market-town of Ditmarschen (Holstein). He was the youngest son and sixth child of Pastor Mauritius Rachel. His youth was one of hardship. When his father died, his mother sent the nine-year-old boy to school at Husum, where he remained two years; subsequently, his mother procured his admission to the Bordesholm Academy, which had been founded in 1566 by Duke Hans von Holstein out of the revenues of a suppressed monastery of that place. This academy offered instruction and entirely free maintenance to a number of scholars (originally 12, and later 36). During five years Samuel Rachel enjoyed these privileges. In 1643 the students were dismissed from the institution, in consequence of the occupation of Holstein by the Swedish armies. Rachel then entered the Academy of Hamburg; but he remained there for only a short time, as his mother was unable to defray the cost of his maintenance in Hamburg. Shortly afterwards he was apprenticed to an apothecary; but finding the place uncongenial he returned to the Bordesholm Academy, which in the meanwhile had been reopened. It was with great reluctance that he allowed himself (as he puts it in his autobiography) " to be immured again in this scholastic or penal institution "; but it was unavoidable, the means of the family having been considerably reduced through expenditure incurred in the education of three older brothers. " The suffering and misery," Rachel continues, " which I endured in this penitentiary can not be expressed in words; the mere remembrance of them fills me with horror." Not only were the scholars underfed or given unwholesome food

[1] In Pufendorf's chapter 3, mentioned in the text, he refers to Rachel's doctrine, though he does not indicate Rachel by name. See Nys in *Revue de droit international et de législation comparée,* Vol. XVI (1914), p. 284.

[2] For Rachel's writings, cf. v. Ompteda, *Literatur des Völkerrechts,* 1780, Vol. I, pp. 275-278; for Rachel's life and works, cf. Jöcher, *Allgemeines Gelehrten-Lexikon,* Vol. III, and *Allgemeine Deutsche Biographie,* Vol. XXVII, p. 104; for his life, cf. especially the excerpt copied from Rachel's autobiography, in the library of the University of Kiel, and published by Ratjen in *Archiv für Staats- und Kirchengeschichte der Herzogtümer Schleswig-Holstein und Lauenburg,* Vol. I (Altona, 1833), pp. 335-362, and Vol. III (1837), pp. 99-166.

which brought on illness, but they also slept in rooms which were cold in winter and in summer visited by swarms of flies. Furthermore, blows were showered upon them on the most trivial pretexts, and at times the Rector of the institution would devise special tortures; for instance, in the scorching heat of summer he for a whole month forbade the scholars all outdoor exercise and had the windows nailed up. The instruction, however, was not bad; but the severity of the discipline exasperated many of the pupils to a desperate defiance, while it degraded others to a slavish fear. In view of these conditions we can not but regard it as proof of a strong, healthy, and sterling nature, alike on the physical and the spiritual side, that Rachel, although often finding life overburdensome and bereft of the loving care of his parents, was nevertheless able, in later life, to achieve great things. In 1648 he graduated from the Bordesholm Academy; and in accordance with the then prevailing custom he entered the University of Rostock, to study there for three years at the cost of the Duke. To gratify the wishes of his kindred, and also because the Bordesholm bursary was specific in its object, Rachel took up the study of theology there. But he soon realized that he was little adapted to the pulpit; moreover the theological controversies of the time rendered the study of theology irksome to him. Accordingly, with the very ready approval of the Duke, he decided to pursue instead the study of history, philosophy, and jurisprudence; but as regards the last-named, it was, as Rachel observes, too late for him to profit fully by the lectures thereon given by many of the able jurists then teaching at the University of Rostock. So, after three years and a quarter spent at this university, he went to Jena in order to devote himself mainly to the study of jurisprudence. Lack of sufficient means compelled him shortly afterwards to return to Holstein to earn his livelihood by teaching. He had, however, after four months, to relinquish a tutorship which he had obtained in a noble family, because the external conditions there were unbearable and threw him into a violent fever. Subsequently Rachel became a teacher in the Bordesholm Academy, which, however, deteriorated steadily; and after one year he found himself forced again to accept a tutorship in a noble family, this time in the district of Halber-

stadt, Saxony. At last fortune seemed to favor him, for after seven months he accompanied his pupils to the University of Helmstedt in Brunswick. Here he studied for two years and was able to attend lectures on public law, notably those given by Conring, and made the acquaintance of prominent and famous men, such as the theologians Calixt and Christopher Schrader. Through an accident he failed to receive an appointment, which he had desired, to a newly founded *Ritterakademie* (gymnasium) in Lüneburg; and nothing came of an offer of a position in Frankfurt-on-the-Main, because the project of establishing a higher gymnasium there fell through eventually. This offer, however, led to Rachel's remaining in Frankfurt for some time; and here, among other diplomatic representatives of the princes, who had come to Frankfurt on account of the impending election of an emperor, and of peace negotiations there under way, he made the acquaintance of Johann Schwarzkopf, the representative of Brunswick. Rachel became secretary to the latter, and on his recommendation was appointed professor of moral philosophy in the University of Helmstedt in 1658.

Here, besides an edition of the so-called Nicomachean Ethics of Aristotle, to which he wrote an introduction, Rachel also brought out a series of dissertations of a philosophical and moral nature. He left Helmstedt in 1665 in order to take an active and successful part in the establishment of the University of Kiel and to assume at once the duties of a professorship of the Law of Nature and of International Law in this university. The *Dissertationes de jure naturæ et gentium*[3] appeared in Kiel in 1676.

Soon after, Rachel's activity as an academic teacher came to an end, an event due in part to divers intrigues hatched in the university and directed against him. He then went to Hamburg, where he became a diplomatic agent in the service of his patron, Duke Christian Albrecht von Schleswig-Holstein-Gottorp, whom the King of Denmark had driven out of his duchy. In 1678 he

[3] These were published in one volume, which is reproduced here; it will be seen that it is the second dissertation which specifically deals with International Law, and that this topic occupies pp. 233-334 of the whole volume. It is with this second dissertation alone that we are concerned in this introduction. The two dissertations are dedicated to Otto Grote, Privy Councilor of Brunswick-Lüneburg, whose acquaintance Rachel had made at Jena. For Grote, see *Allgemeine Deutsche Biographie,* Vol. IX, pp. 758 *et seq.*

represented this prince in the peace negotiations at Nymwegen; and until his death, December 13, 1691, he served the Duke in various other official positions and notably in diplomatic affairs, as for instance at Dresden, Regensburg, and Nürnberg. Finally he became Doctor of Laws, State Councilor, and also Swedish Privy Councilor.

For Duke Christian Albrecht he wrote several state papers. In addition to these he published in 1680 *Introductio in jus Germanicum,* Amstelodami, reprinted in 1680; and in 1681 *Institutionum jurisprudentiæ libri IV* (Kiel).

His autobiography and likewise his dissertations on Natural Law and on the Law of Nations stamp the author as a man of more than ordinary intellectual power; and the autobiography makes it clear that he did not lack strength of character.

In direct opposition to Grotius, Rachel distinguishes the Law of Nations from the *jus naturale.* According to Rachel's theory (cf. §§ V-IX, and in particular the beginning of § IX), the Law of Nations is part of the *jus arbitrarium,*[4] which is based either upon agreements or upon customs (cf. § II). In custom, Rachel finds an implied agreement; for, States being independent of one another, obligations between them can come into being by agreement only. The implied agreement which shows itself in custom need not, however, be *concluded* between all nations; for we do not even know all the nations of the earth. All the requirements in this regard are met when several, and in particular when the civilized (*moratiores,* § XXIII) nations recognize a definite rule. On the other hand, an agreement can deal with the legal relations of the contracting nations *only,* so that by the side of the general Law of Nations (*jus gentium commune*) there exists also a *jus gentium "proprium",* operative only between individual nations (§ XXIII).

Rachel thought it furthermore probable that the *jus gentium commune* had its origin in the *jus gentium proprium,* by the development of what had been adopted in particular cases as fitting. With this premise established, Rachel proceeds to criticize the views held by a number of well-known authors regarding the

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[4] Therefore, Rachel consistently denies the frequently made distinction between a *jus gentium "primævum"* or *"primarium"* and a *jus gentium "secundarium"* (§ XVII).

nature of the Law of Nations, in particular the opinions of Zouche and of Albericus Gentilis (§§ XXXI *et seq.*); after which he passes on to an exposition of the Law of War. Rachel states that the Law of Nature demands a *justa causa,* that is, a serious injury, for beginning a war; that a trivial injury will not suffice—not being ground for a reparative action in civil law; much less can it justify the *præternaturale remedium* of war; that, moreover, there is no *justa causa* when reparation has been offered, and that the goal should always be peace. Finally, he says, the *jus naturæ* demands that only legitimate means be resorted to in war, and in this connection the *jus arbitrarium,* the *tacitus consensus* of nations, must be taken into consideration.

A war entered into in accordance with the Law of Nations presupposes, further, that it is undertaken by the supreme power of a State, and that its commencement has been notified to the opponent with due solemnity, or in accordance with the prevailing custom (§§ XLIV, XLV). In the conduct of war, a distinction must be made between that which is lawful (*licitum*), and that which is honorable (*honestum*). According to Rachel, it is still lawful to put to death children and women, and those who are willing to surrender, but not those who have been already taken prisoners; and, says he, in the judgment of the better writers it is also unlawful to use poison. Property belonging to the enemy may without exception be taken and destroyed, not even excepting, in Rachel's opinion, property (edifices) dedicated to religious worship. Whatever is captured from the enemy in time of war, becomes, says Rachel, the property of the captor in such manner that the complete and final ownership must be universally and definitively recognized by the victor and third parties. As Rachel expressly states, there is in this matter no difference between public and private property (§§ XLVII-XLIX).[5] On the other hand, the rule whereby prisoners of war were made slaves no longer obtains among *Christian nations,* as Grotius in particular attests—a

[5] In § L—its logical connection with the preceding or following sections is defective—Rachel takes up the question of the extradition of criminals. He regards it as a principle of the Law of Nations that criminals who are sought should be surrendered, or punished by the nation within whose borders they have fled. This obligation, resulting from the Law of Nations, should, of course, be limited to offenses "*quæ statum publicum tangunt*" (offenses against the state), and to other particularly serious offenses.

proof, as Rachel expressly points out, of the existence of a "*jus gentium commune minus late patens*". The victor, however, acquires supreme power over a completely subjugated State or over a subjugated part of the hostile State after cession has ensued (LI). Whatever offense is committed against the enemy during a truce is a violation of the Law of Nations (LII). Rachel still considers *postliminium* as a valid title. He does not express any personal opinion regarding the treatment of hostages, but contents himself with citing historical precedents on the subject (LIV, LV). The harsh treatment to which enemies (and hostages) are liable by agreement between nations (*ex placito*) leads Rachel to the conclusion that much of the arbitrary Law of Nations contradicts the Law of Nature, and is, therefore, unjust; authors, says he, must in consequence distinguish, as Grotius did, between a *jus gentium externum* and a *jus gentium internum*, between a *jus gentium "verum"* (not contrary to the Law of Nature) and a *jus gentium "putativum"*; and, as Grotius demonstrated, the former tempers the latter and at times renders it inoperative (LVI, LVII).

Among the most excellent rules of the Law of Nations are those relating to the safety of ambassadors, that is, more exactly, those persons who (for the purpose of carrying on negotiations) are sent by the highest authority of one State to the highest authority of another State, and who, when sent to the opponent in a war, are called heralds. It is necessary, however, that they should be admitted as ambassadors by the other State.[6] The request for admission may be refused for *justa causa;* for instance, to the ambassador of a State that has shown itself particularly cruel in the war; likewise, to the ambassador of a ruler who is a confessed atheist, and for this reason cannot be trusted. Oftentimes, personal information is sought regarding the ambassador himself. In the controversial question whether the ambassador is only protected against an improper exercise of power or is exempt as well from the jurisdiction of the courts of the country, Rachel

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[6] In § LXIX Rachel cites examples to show that ambassadors are in no way protected in the States that have not signified their willingness to receive them; and, on the other hand, that trumpeters employed in time of war to carry messages to the enemy, are inviolable (LXX).

declares himself in favor of the latter alternative; should the case call for it, recourse must be had to the sovereign whom the ambassador represents; and in an extreme case the right of self-defense is exercisable and might justify even the killing of the ambassador (LIX-LXVIII). The inviolability of an ambassador extends to his suite and to all the equipment of his hotel. Violence to ambassadors in breach of the Law of Nations has often led to wars; Rachel seems not to disapprove of this, although he condemns retaliation in such a case (LXXI, LXXII). In connection with the law about ambassadors Rachel discusses the Law of Treaties. He observes that treaties of peace are often of far-reaching significance to a large number of nations and that, on occasion, observance of these treaties is secured by accessory provisions; one method, for instance—a method not always free from objection—is seen when a nation not directly concerned in the particular treaty guarantees its observance. There are also treaties of alliance of various kinds (LXXIII-LXXVIII).

Rachel now returns to discussions of a more general nature. After showing that it is necessary to distinguish between the precepts of morality (international courtesy) and the precepts of law (LXXIX), he refutes some erroneous ideas regarding the Law of Nations, and in particular the idea that the apportionment of Things (the earth) among the various nations and the punishment of the guilty are within the scope of the Law of Nations. According to Rachel, the apportionment of Things, that is, the right to property, comes within the scope of the Law of Nature; on the other hand, the right to punish is derived from the right to legislate; and no right whatever to punish is derived from the right of necessary defense exercised in war (LXXX-LXXXIII). Then he disproves at length the arguments in support of the opinion that there is no Law of Nations, an examination which he did not make at the beginning, as he might have been expected to do, because he wished first to set out in detail the contents of the Law of Nations. In answer to the objection that not all nations without exception are bound by the Law of Nations, Rachel reiterates what he has said already; and he meets the objection that the rules of the Law of Nations can not be traced back to specific treaties, by the proposition that a *tacitus consensus* exists and that it is

sufficient that something is accepted and observed as law, though the origin of the rule be uncertain. If, thirdly, it be asserted that on the one hand the precepts of the Law of Nations are unceremoniously annulled or changed, and on the other hand are often disregarded, Rachel would, in answer, have us remember the force of Customary Law and of Desuetude. As for the man who, in violation of the precepts of the Common Law of Nations and as an enemy of God, indulges in capricious tyranny, Rachel declares that Providence is wont to curb and punish him (LXXXV-LXXXVIII).

Rachel's last topic is a somewhat extended refutation of the objection raised by Hobbes and Pufendorf (and already briefly criticized by our author) that nations are bound by the Law of Nature only. He shows, by citing specific instances, that much which is not derivable from the *jus naturæ* is nevertheless accepted as a precept of the Law of Nations, and, *vice versa,* that much which corresponds to the *jus naturæ* is in fact not observed, unless we have in mind the violation of law, while, on the other hand, States are careful not to violate the Law of Nations, even when they are putting forward an unjust claim or carrying out an unjust scheme (cf. esp. CII). In this connection Rachel's last argument seems rather strange (CVI-CXVIII), namely, that the use of coins by all nations as a measure of value and medium of exchange is a legal custom not derivable from the *jus naturæ.*

In conclusion (CXIX-CXXI), Rachel inveighs most impressively against those who light-heartedly deny the existence of the Law of Nations, that common bond of nations, and thus conjure up a monstrous danger. On the other hand, as he says, those deserve the highest recognition who have already urged upon their nations and their rulers the establishment, by general treaty, of a Supreme College of Fetials, charged with the settlement of all disputes arising between nations, so that war can be waged only when a nation will not comply with a judgment of the College, or refuses to recognize its authority altogether; such a plan as Henry IV[1] of France was said to have already conceived. This proposal (says Rachel) of course could not please those who do wrong and delight in bloody wars; but it would please those

[1] Regarding this plan, which in reality did not come from Henry IV, but from Sully, cf. Schücking, *Die Organisation der Welt,* Leipzig, 1909, p. 45.

nations which are truly imbued with the spirit of Christianity, and those which are unwilling to suffer wrong and to be oppressed by those who are superior to them in strength. Such a tribunal, says he, was especially commendable or necessary for settling the disputes of German States amongst themselves, and of German States with foreign countries; for, in truth, the German States formed a single realm,[8] but that unity was being imperilled by internal strife and by the incursion of foreign powers. Rachel cites the Achæan League in ancient times, and in modern times the Helvetic League and the League of the Belgian Provinces, as useful examples of organizations for the avoidance of war within a larger whole.

As the foregoing survey of the contents of his work shows, Rachel was a sagacious author intent upon a practical purpose, and at the same time was not without optimistic, idealistic traits. But, as Ompteda says, he was at fault in separating the Law of Nature from the Law of Nations, because (as it is nowadays rightly put) it is not the Law of Nature, but the nature of the thing itself which is an essential source, and in strictness *the* source, of the Law of Nations. Still, as Ompteda further remarks, the error is more an error of form than of substance, since the Natural Law of Rachel is directed, after all, to the relations between nations. Yet the error is not altogether negligible; for, all that which, as direct positive Law of Nations, rests on treaties and custom must, in its application to concrete cases, be interpreted according to the nature of the thing itself; this latter, therefore, penetrates to a certain extent the positive rules in question, and appears everywhere as a regulating principle where those positive rules are deficient and doubtful, while according to Rachel's conception the Law of Nature can, at times, furnish results which are not based upon the Law of Nations or are in conflict with International Law.

LUDWIG VON BAR.

Göttingen, June, 1913.

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[8] Rachel here appeals to his celebrated teacher, Conring. Of his relation to this writer Nys writes: "Was Rachel an innovator? We must answer, No. Writers of the late seventeenth and early eighteenth centuries who dealt with his treatise *De jure naturæ et gentium* have remarked that its fundamental ideas were borrowed from that man of immense talent, Hermann Conring." *Revue de droit international et de législation comparée,* Vol. XVI (1914), p. 285.

Dissertations

on

The Law of Nature and of Nations

BY

SAMUEL RACHEL

Jurisconsult and Professor of Law in the illustrious University of Holstein

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Kiel:

From the press of Joachim Reumann, University printer,

In the year 1676.

To the author's very illustrious and high-born Lord,
the Lord Otho Grote;
Councillor, in fealty most approved and of the highest dignity, of the most serene Duke of Brunswick-Luneburg; Governor of Frideland; Hereditary Ruler of Wedesbüttel, Fachenfelde, Jüen, Wrestädt and Knesebek, etc.; the author's Patron and good friend:

Health and unending Prosperity.

That you would be great and be occupied in great affairs and functions, my very illustrious Lord Grote, was for me no mere matter of guess, but was based on sure indications, what time we were fellow-students in the Julian Academy and there consumed I know not how many measures of salt. And just as this familiar companionship enables one to search out right well the natural parts and character of the mind, so it conduces to the formation and preservation of friendship. There was in you a burning zeal for learning, and although you gave yourself primarily to the studies which perfect the mind, yet you were in addition a sedulous follower of those arts and exercises whereby your body might be alike bedecked and equipped for the ready and skilful performance of the duties of peace and war, and whereby the fortune which was yours by right of birth might be rendered more splendid still. There was in your disposition an easy suavity which lured all the better and more refined into an affection for you and which in due time was to pave for you a speedier way to substantial honors. Aye, what a lively joy I felt when what your character foretold came to pass, and not only so, but when your worth was matched on such agreeable terms with the prizes of Fortune, and its merits with her reward. And although, according to the old saying, a humanely disposed character often suffers a change through high honors, yet I reckon that that happens only to one whose mind chances to be but lightly tinged with virtue and wisdom, and not thoroughly imbued therewith. For Aristotle's saying is profoundly true, that there is no Society, if it be such in fact and

deserve to continue to be so called, but owes its preservation more to Friendship than to Justice. If, then, Friendship prevails, not only between persons who are united by the needs of nature, but also in matters of human institution, alike between equals and unequals, and even between Sovereigns and subjects, it is a seemly thing to give it stability by means of those posts which are everywhere appropriate to the purpose, and for the members of Societies to afford each other mutual support and good-will. For it is common knowledge how frail and perishable a thing the empire of a Prince is, unless buttressed by the aid of friends. And wherever Princes have given a man a trust, be it of a state secret or of an army or of a fortress, the prime requisite is Friendship if faith is to be kept and not prostituted by betrayal or other iniquitous dealing, even though the latter course be enjoined by Justice in the teeth of Friendship. Xenophon, whose purpose was to depict the ideal Prince in the person of Cyrus, represents Cyrus as holding this discourse with Cambyses: "I would have you know, Cambyses, that the scepter whereby you retain your kingdom is not this golden one, but that faithful friends are a king's truest and trustiest scepter" (*Cyropædeia,* bk. 8). Although Princes have no difficulty in understanding that the best support of the burden of empire is to be found in the loyalty and aid and counsel of friends, yet it is by no means so easy for them to distinguish the true and faithful friend from those who feign to be such; but this is a business which requires in themselves integrity of character, ripeness of judgment, and wide experience, attributes of his Cyrus which the writer already cited extols as follows: "What happened towards the close of his life is a striking proof of his own goodness, namely, that he could then rightly judge who were his faithful, loving, and constant friends" (*Anabasis,* bk. 1).

Accordingly, now that the most serene Duke of Brunswick-Luneburg, a Prince of highest renown for wisdom, clemency, and statecraft, holds you, my very illustrious Lord Grote, among his friends, nay as the loyalest of the most loyal, and has, with singular penetration, admitted you to the innermost places of his great favor, you act worthily of this and of your office in doing everything with perfect good faith. What times we have fallen on, you know—how doubtful are the dice of Mars, and how a well-played

piece often loses its reward by the decree of Fortune, and plans are all upset. There being then, in the right ordering of these matters, need of a foresight so minute as almost passes the art of man, they whose schemes prosper are not the only ones to be praised, but those also are to be esteemed who enter on no undertaking rashly or heedlessly or with low cunning, but whose conduct, frequently subordinated to the exigencies of the time, is marked by good faith and by that degree of wisdom which is practicable, and this although their plans, not for any ineptness but by reason of the inconstancy of human affairs, lack the success which was looked for. "In dealing with danger," says Cicero, "we should copy the practice of doctors, who use mild remedies in mild attacks of illness, but are driven to resort to hazardous and doubtful treatment when the malady is severe. Accordingly, it is madness, in a season of calm, to desire a storm; but by all expedients to keep off the mischief of the storm, when it does come, is the part of a wise man —and so much the more if the good to be obtained by getting well rid of it outbalances the evils one may be brought into by the attempt." But just as Kings and Princes need friends of the most perfect fidelity, so, no less, do these latter need sincere friends if the cares of the former are to be aided by the counsels, or be lightened by the subordinate activities, of the latter; and the more thoroughly they are guarded by a phalanx of faithful friends against the crafts and trickeries of the envious and malevolent and against the snares of pretense and of disguise, so much the firmer and safer, on the one hand, is their Prince's favor towards them, and on the other, their own fortune, which is so exposed to the various shocks of time. How gravely, then, do those highly placed friends of Princes err and infringe the rules of wisdom who, in this regard, often take a pleasure in displaying their power and, so far as they can do it with impunity, in despising, irritating, offending, afflicting or downright oppressing others— seeing that this can rarely be done with complete impunity, Fear or Hatred being a bad guardian of Durability and of despotic Power. Every prudent person, therefore, counsels, nay exhorts, them to bind friends to themselves by kindnesses, and through the kindnesses which these render to evoke fidelity and respect and store them up for their own advantage. Seeing, then, my very illustrious Lord Grote, that you at one time caught in me a some-

thing worthy of your affection (I know not what it was, if not the insistence with which I never yielded to you in point of sincerity and affection), and that the great fortune with which you are adorned has not shifted you from that attitude, I gratefully ponder on this undoubted kindness and good-will of yours towards me and fondly cherish it. I am not forgetful of the means by which Friendship between unequals, which in our Philosopher is called καθ' ὑπεροχήν, the ideal kind, is to be tended and strengthened, so that the more the worthier friend surpasses the other in worth or in other social advantages, so much the larger share of the peculiar good of Friendship may fall to his lot. And, consistently therewith, inasmuch as I perceive how you, my very illustrious Lord, excel in pride of birth, and power, and worth, and great deserts, and splendor of official position, it is my part to wait on that surpassing eminence with devoted affection and fitting honor. To which end it is my desire to dedicate to you my commentary on *The Law of Nature and of Nations* as if it were a demonstration of my respectful regard; and not only so, but to take up a public stand before others—aye and, should my work attain old age, before posterity too—with the intent that all should understand that, in proportion as you surpass me in dignity, I shall be all the more diligent in my respects to you. What my bent of mind is you know, how that I have no sordid aims or ambitious aspirations. None the less do I beg and crave of you, by your favorable regard and your faithfulness to your promises, not to disdain to preserve the memory of our long-standing friendship and its utility to me and mine, especially (for we are but men) should anything untoward befall me. We, on our side, will strive to deserve that boon by whatever duties and services and respects are in our power, and will pray God that all happiness may attend you and your high-born house and that He will suffer Himself to stand in our stead as debtor of the outstanding obligations.

One who most diligently respects your very illustrious, high-born estate:

Samuel Rachel.

Written in the University of Holstein, at Kiel,
on the 22nd of January, 1676.

With God's Help.

THE FIRST DISSERTATION.

On the Law of Nature.

I. The traditional classifications of Law (*Jus*) are numerous and very various. Ulpian, using the word Law (*Jus*) to denote Jurisprudence (*Jurisprudentia*) or the science of Law (*Disciplina juris*), makes two divisions of that study—the one Public Law, the other Private Law. And the latter he declares to be of threefold origin; namely, from the precepts of Nature, and of Nations (*gentium*), and of individual States (*Dig.* 1, 1, 1, 2). And then in his own fashion he describes Natural Law (§ 3), the Law of Nations (§ 4) and Civil Law (§ 6). Gaius divides up all Law into Civil Law and the Law of Nations (*ibid.,* § 9). By the former of these he means not the science of Law, but the Law which each State has adopted by way of positive institution as its own; by the latter he means Natural Law. Other divisions and subdivisions I for the present pass by, because, for my part, I look for a classification which, in accordance with the maxims of the logicians, operates on the immediate subject (Aristotle, *Posterior Analytics* 2, ch. 13). A classification ought, on this principle, to proceed by a series of graduated partitions and not, as the saying is, by a jump. And if we apply these rules to the classifications of Ulpian and Gaius, neither will stand scientific criticism. Doubtless, as regards that classification which is usually attributed to Ulpian, it will be found preferable to Tribonian's: for Ulpian was not dealing with Law (*Jus*) in the absolute, as if it were an ultimate genus under which species were to be grouped; but his concern was with Roman Law, and it is that which he alleges to be derived from the precepts of Nature, of Nations and of the individual State. Now it is unquestionable that the books of Roman Law comprise laws and rules of varying kinds, some drawn from the Law of Nature, some from the Law of Nations and some of home-origin, born and raised in the Roman State. And that Law is, according to my thinking, properly called the Law of Nations (*Jus Gentium*), of which traces appear in the titles of the Digest: *On the Acquisition of Ownership* (41, 1), *On Captives and Postliminy* (49, 15), *On Military Matters* (49, 16), and *On Embassages* (50, 7). All the same I am quite aware, and have elsewhere shown, that Ulpian's description both of the Law of Nature and of the Law of Nations is unsound. Now Tribonian, following at

the outset exactly in the footsteps of Ulpian with the assertions that the study of Jurisprudence is concerned either with Public or with Private Law, and that the latter is derived from the precepts of Nature, of Nations, or of individual States (*Inst.* 1, 1, 4), immediately passes to Title II and puts at the head of it the rubric in general terms, Concerning the Law of Nature and of Nations and the Civil Law (*De Jure Naturali, Gentium et Civili*). This, however, is an incorrect classification, if it be taken that the thing classified is Law in the absolute, for it is not a series of operations on what comes up next and immediately, as will soon appear in the sequel. Nor is Gaius' classification of Law exact; for over and above the fact that he equivocally cries up the Law of Nations for the Law of Nature, his description of the Civil Law is such that these two species do not exhaust between them the substance, considered absolutely, of the thing classified. Now logicians teach that while each member of a classification must contain less than the thing under classification, yet all taken together should equal or exhaust it.

II. Aristotle, then, is perfectly correct in classifying Law (*Nicomachæan Ethics* v, 7) into Natural and Positive (*Legitimum*), the latter class comprising all laws of an arbitrary character, whether they are adopted as peculiarly suited to the needs of a given State, or of whatever other kind they may be. And inasmuch as in this classification the subdivisions are made of what comes up next and immediately, each species of Law is contained in one or other of these subdivisions and can be referred to it as to a genus.

III. It may be urged that our Philosopher, too, is classifying not Law considered simply (ἁπλῶς), but the Civil Law; for his very words (in the same chapter) are: τοῦ δὲ πολιτικοῦ δικαίου, τὸ μὲν φυσικόν ἐστι τὸ δὲ νομικόν; that is, Civil Law is in part Natural Law and in part Arbitrary. But the explanation thereof is as follows. He had shown that a State is a Natural Society, of the highest degree of elaboration, and that its aim is ἀρχιτεχνικόν; that is to say, the aims of other lower or simple societies are subordinate and subservient to it, in such sort that man is not only φύσει ζῶον κοινωνικόν, by nature a social animal, but is also φύσει ζῶον πολιτικόν; that is, drawn by natural instinct into Civil Society. For, although man has a natural appetite for what is good and attains it in the conjugal and paternal and domestic union, wherein he enjoys a certain degree of happiness, yet that union has not that completeness, does not comprise τὸ πέρας τῆς αὐταρκείας, the highest pitch of fulness, which Civil Society does (*Politics* i, 2). Accordingly, as not even civil happiness is absolutely the Highest Good (*Summum Bonum*), but only of its kind, that is in relation to civil life, there is no doubt that Nature's intent was to lead man on to the type of life, the completest form of

union, in which he should attain τἀνθρώπινον ἀγαθόν, human good, and that in the highest possible form (*Nic. Eth.* i, 2, § 8).

IV. For the better understanding hereof it must be understood that Union (*Societas*) means a unity built up of many individuals working together for the common weal. But the question arises, What is the constituent feature of a Union, Society, regarded as a unit? Law. For it is by this bond that every Society is kept together and all its members compelled to one and the same common purpose. For none can lay down commands or prohibitions to himself, says the jurist Marcian (*Dig.* 4, 8, 51). If, however, you prefer to say that Societies are kept together by Order, that way of putting it does not differ from the other, ἡ γὰρ τάξις, νόμος, "For Law is Order," says Aristotle (*Politics* iii, 12).

V. All Societies are either of natural or of human institution. Of the first kind are those to which Nature has assigned some natural end, implanting in man an appetite to pursue that end and teaching him the means appropriate thereto; for just as Nature never does anything purposelessly, so also she does not move towards any indefinite objective, but intends that human appetites be limited to some definite ultimate end and find repose therein. Of the second kind are the Societies which are formed at the pleasure and discretion of mankind on the principle of that changeable and varying idea, Utility.

VI. Seeing, then, that all Societies are held together by the bond of Law and that by general admission Law is the conserving element of human Societies, it is clear that, the ultimate aims of these being very diverse, they can not be governed by one kind of Law, but some by Natural and others by Arbitrary Law. Nor is the one kind or the other kind of Law quite the same in all Societies, but varies with the differing characters of the Societies and of the purposes they serve. For Conjugal Society is subject to one kind of Law, Paternal Society to another, and that of master and servant to a third; and so it is in other varieties. Moreover, Natural Societies are not based in our times on Natural Law alone, but very often there is a subsidiary application of many laws of the Arbitrary type, matters which affect the essence and ultimate aim of those Societies resting on Natural Law, but intermediary matters and their subsidiaries, furnished by the principle of Utility (αὐταρκεία or εὐπορία), being left in a large degree to human discretion and therefore determined by Arbitrary Law.

VII. Now just as human Societies differ one from another, some being more perfect than others, so it is with the diverse laws of diverse Societies; some are more perfect than others. For although any given Law of Nature as found in any given Natural Society is perfect, yet if these Societies and their ultimate aims are measured one with another, undoubtedly some of the laws of these same will be found, as regards the attainment of solid welfare (εὐδαιμονία or εὐπραξία), more perfect than

others and endowed with a differing degree of authority (κυριώτερα). In the same way, if the laws of other Natural Societies be compared with the Civil Law, the result must be that given by Aristotle in *Nic. Eth.* v, 6, §§ 7, 8: "In the former there is no Civil Justice (*Jus Civile*), but only a certain Justice (*Jus*) which is analogous to it; for Justice (*Jus*) in the strict sense (κὰτ' ἐξοχήν) can exist only where the relations of people are determined by Law (*Lex*)." Hence it appears that the words *Jus* and *Lex* have their root in a common basal idea (ἀφ' ἑνός *dici*), being primarily applied to *Jus* and *Lex* of the *Civil* type and secondarily, and in a lower rank and degree, to the *Jus* and *Lex* of other Societies than the State. Accordingly, when the Greek paraphrast, dealing with the text just quoted from the Philosopher, bethought himself of the Law prevailing in the Paternal and Domestic Societies, he added: κυρίως τοίνυν καὶ ἀληθῶς δίκαιόν ἐστι τὸ διανεμητικόν, καὶ τὸ διορθωτικόν. ὅπερ ἐστὶ τὸ πολιτικόν. "That is properly and truly *Jus* which is called Distributive and Corrective (Justice)—and such is the Civil Law (*Civile Jus*)."

VIII. Hence it may be gathered why it was not Law in any indeterminate sense, but the Civil Law such as a State makes entire use of, that the Philosopher divided into Natural and Arbitrary. He had, you see, to choose the right first term in his proportion or analogy (*primarium analogatum,* as the Latin philosophers with too little Latinity style it) in order to fix by reference to it the nature of those laws (*jura*) which are inferior in rank to Law (*Jus*) properly (κυρίως) so called, namely, the Civil Law. If, then, Law (*Jus*) of the most perfect type as found in the most perfect Natural Society is correctly classified into Natural and Arbitrary, doubtless the laws of the less perfect Natural Societies admit of the same treatment. Be it then agreed that all Law used by a State or by men, those naturally political animals (φύσει ζῶα πολιτικά), is either Natural or Arbitrary.

IX. The best classification, then, of Law in the general sense is that given by the Philosopher (*Nic. Eth.* v, 7), whereof one member is φυσικόν, Natural, and the other νομικόν, Arbitrary Law. "Natural" he explains, in the same place, as follows: "That which has everywhere in the world the same force and is independent of the will of a lawgiver." And he illustrates this in § 5 of the same chapter thus: "That which exists by Nature is rigid and unchangeable Law and has the same force everywhere, just as fire burns both here and in Persia." This makes it easy to see how far-reaching is the bindingness of this Law, in that it affects all men; but here we touch a matter requiring further investigation.

X. Before, however, we scrutinize the innermost parts of Natural Law, some terms and words must be explained and differentiated so that our argument may proceed without a stumble. Note, then, in the first place that there is a difference between Natural Justice (*Justum Natu-*

rale) and Probity (*Honestum*); for, although the two agree in nature and moral quality, still they differ in adopting different attitudes and points of view. For if, putting aside other meanings of Probity, you understand it to mean that which displays itself in a virtuous character and in the conduct which flows therefrom, still Justice differs from it in this respect, that it contains at the same time the idea of obligation and of relation to another party, while Probity marks a perfection, an excellence and moral dignity of its subject and possessor regarded as an isolated individual. In saying this I do not, however, mean to assert that all Probity is included in Natural Law so as to put on the nature of Justice, seeing that many things are deemed Honest in opinion and morals which are not sanctioned as Just by Law, especially by Natural Law. Ulpian himself recognized this distinction (*Dig.* 50, 16, 42; and 50, 13, 1, 5).

XI. There is a close connection also between Probity and Befittingness (*Decorum*), but so that a difference between the two can be detected. "Befittingness," says Cicero, "is conduct which accords with that excellence in man whereby he, in his nature, differs from other animals." As, however, opposites often throw light on each other, it will not be out of place to recall here the passage in which Cicero (*Orator,* bk. 2) describes the unbefitting or inept (*ineptum*): "When we say that a man is *ineptus,* the word seems to me to be taken from the fact that he is *non aptus,* not fitted, and that has a wide application in the custom of our speech; for he who either is not alive to the requirements of the time, or talks too long, or obtrudes his own personality over-much, or does not take into account the dignity and susceptibilities of those in whose company he is, or, in a word, jars or exceeds, he is said to be *ineptus.*" Guilielmus Grotius, in his book *De principiis juris naturalis* (ch. 3, n. 4), says that *Decorum* is often indicated by another word, namely *Consilium* (Counsel), and that its force is rather hortatory than obligatory. And Cicero recognized that distinction, though he could not express it, saying, "The difference between Probity and Befittingness can be more easily understood than explained; for whatever Befittingness there is in any action, it immediately arises from the Probity of it" (*Offices* 1, 27, 94).

Richard Cumberland (*Prolegomena* to his *De legibus naturæ,* § 16) illustrates this neatly in connection with his theory of Benevolence. "Since," says he, "the condition of universal mankind, being most abundant in all mental and bodily gifts of Nature, fitly proportioned one to another and provided with a view to the best ends, is naturally exceedingly beautiful (this word being clearly consistent with the definition of Beauty as something deduced from the shape and harmony of the parts), it is obvious that those actions which are called forth as fitted, of their own inherent strength, to setting up and conserving this condition, may

deservedly be called Beautiful or Decorous. Hence we can obtain an explanation of τὸ καλόν (the Beautiful) and τὸ πρέπον, or the Decorous, so often lauded by philosophers in the conduct of the virtuous." My own view is that, though there is close relationship between the two, the Decorous is remoter from the truly Just, while Probity is nearer to it, at any rate in many matters.

XII. The anonymous writer (a Belgian) of *Dissertatio epistolica de justo et decoro,* admitting, as he does, that a difference exists between these two, divides sins into two classes, according as they are against Nature, strictly speaking, or against Decorum and the natural dignity of man (pp. 41, 89). Although this is not a groundless distinction, and although there are undoubtedly varying degrees of morality, I am nevertheless dissatisfied with the description given of sins against the dignity of man, in which nothing is withheld from God or one's neighbor which should in Justice be rendered; and I also disapprove of the miscellaneous examples adduced under this head, as if Whoring and Drunkenness offended only against Decorum and the dignity of man. Supplemental remarks on the explanation of the words mentioned a little while ago may be found in my introductory discourses on Cicero's *Offices*. In these I have, further, shown at some length what Duty (*Officium*) is and how it differs from Justice (*Justum*). It is obvious that the former is of wider reach than the latter and that it does not always involve a necessary element in the *Obligation*. "How much wider-reaching the rules of Duty are than those of Law," remarks Seneca (*On Anger,* bk. 2, ch. 27).

XIII. Again, there is a great difference between, on the one hand, To be by nature, To spring from a natural inclination, To be agreeable to Nature, or Natural Law, and, on the other hand, really To be by a Law of Nature. For "Natural" is often predicated of (1) things to which Nature inclines, (2) things which she only allows, (3) things which she, after her fashion, pronounces to be honest though not admittedly due, (4) things not repugnant to the Law of Nature and which may so far be styled just in that they are not unjust. But those things alone spring from a Law of Nature which Nature enjoins or forbids in such sort that the one can not be omitted or the other committed without sin. Guil. Grotius, in his *De principiis juris naturalis* (ch. 2, n. 3), an able posthumous work written in extreme ill-health, supplies yet another meaning, namely, that "Natural" is used of what is usual—a meaning, however, which his brother Hugo Grotius had already propounded in his *De jure belli ac pacis* (bk. 2, ch. 12, § 26). Similar is that according to which "Natural" means what descends from long-standing custom. That things like these must be separated from those which are properly of Natural Law, Mevius insists in his *Prodromum* (insp. 2, n. 8). And this is how *Dig.* 4, 4, 16, 4 and 50, 17, 7 call for explanation. With

these matters premised, let us now come to closer quarters with our subject.

XIV. When, then, we speak of Natural Law, first of all and rightly the question comes, What is that "Nature"? I do not propose to collect here a medley of numerous opinions and of diverse views; for on this point one man's diligence—that of Selden (*De jure naturæ et gentium juxta disciplinam Hebræorum,* bk. 1)—can suffice. But I will track out truth by the right way. Justinian, and I think very appropriately, refers this matter to Divine Providence, saying (*Inst.* 1, 2, 11): "Natural Laws are those which are observed by all peoples alike and have been appointed by Divine Providence"; and also in another place (*Inst.* 2, 1, 11): "Natural Law is that which Nature produced with the human race itself." For, because (as said above) man is by nature a social animal, that is, has received from Nature an instinct and inclination which lead him to form Societies, and to that end has received from the same source the peculiarly well-adapted organ of speech, all these things can come from no other source than God, Whose providences are, like other created things, ordained each to its own end and are upon that principle upheld; and so man, too, is led by the institution of Societies to the end prescribed by God. For, were this not so, the absurdity would follow that brutes and plants and other created things are more in God's care than man is, for whose behoof everything was founded, as the Stoics held of old and as can not be denied by any sane person. And although the Apostle's words (*1 Cor.* 9, 9) "Doth God take care of oxen?" may seem to be opposed to this, yet really they confirm it; for the Apostle does not mean that oxen are absolutely not in God's care, but that men are more so. The *Book of Wisdom* (ch. 6, v. 8) well says: "He hath made the small and great and careth for all alike," ὁμοίως τε προνοεῖ περὶ πάντων; that is, He has left nothing outside His providence and care. Hotoman, accordingly, receives a well-deserved castigation in the commentary of Bachov on *Inst.* 1, 2, 11, aforementioned, for his over-hasty remark that the words "*divina providentia constituta*" (appointed by Divine Providence) are an inept addition inasmuch as civil laws are also so appointed. For, granted that Divine Providence at times directs the counsels and wisdom of lawgivers in the creation of Arbitrary Law, there still remains a very great difference between it and Natural Law. For Natural Law descends in no other way than solely and immediately from Divine Providence; and just as it is lawful for human lawgivers to change or repeal their own Arbitrary Law, so it is alike futile and unlawful to attempt the same in regard of Natural Law.

XV. Now Gaius (*Dig.* 1, 1, 9), whom Justinian (*Inst.* 1, 2, 1) follows, gives a slightly different description of Natural Law (which he καταχρηστικῶς, by a misuse of language, there styles *Jus Gentium,* Law of

Nations), namely, " That which Natural Reason has established among all men." Not a few jurists adopt a similar attitude. Thus, Grotius declares that human nature is itself the parent of Natural Law (*Prolegomena* to his *De jure belli ac pacis*), and both he and many others define this Natural Law as the dictate of Right Reason; and who has not heard that saying of the philosophers, ὁ νομος ἐστὶ λόγος ὁ ὀρθός, " Law (especially Natural Law) is Right Reason "? " There is," says Cicero (*Laws* I), " one Law which is the cement of human society and is created by one lawmaking activity; namely: Right Reason directed towards the issuing of commands and prohibitions; and whoso ignores this activity, whether it be as written or as unwritten Law that it has taken shape, he is unjust." I do not desire to collect more utterances of others to the same effect.

XVI. Now what it is intended to convey by propositions of this kind seems this, that Divine Providence, from Whom mankind has received the instinct and inclination for Natural Societies, has fortified these same with a corresponding Law and preserves them so united by that bond which is in the highest degree suited to the rational nature of man. For if we look at other created things, we perceive that each is furnished with the means and instruments best adapted to its particular ends, so that it would be both absurd and impious to say or think that God bestows less care, or none at all, on man. When Aristotle contends that Nature has done nothing in vain, and especially that she has allotted to man a definite end, supplying him at the same time with the means for compassing it, he illustrates his point by the following passage, among others: " Can it be that there is a special work and activity of a smith and of a cobbler " (and add of bees, ants, silkworms and such like) " but none of a man? Is man born given to sloth and laziness? or, on the contrary, shall we be justified in pronouncing that, just as the eye and the hand and the foot and the other separate members have each their appointed task and function, so man, too, has, over and above all these, a special task of his own? " (*Nic. Eth.* i, 7, § 33.) Since, then, man is constituted by nature a social animal and it is his peculiar task to live according to reason, so that in civil life he may find constant occupation εὐπραξίᾳ, in well-doing, Divine Providence has prescribed rules of life which are best suited to his rational and social nature, and these are the very rules of Nature—rules issuing, that is, from Nature in the active sense (*Natura naturans*), God to wit, Whose providence directs everything to its due end by fitting means, and adapted to Nature in the passive sense (*Natura naturata*), man to wit, as a rational and social animal. Grotius, in the *Prolegomena* to his *De jure belli ac pacis,* makes the same point in these words: " Among the things which are peculiar to man is the appetite for Society, not for any society whatever, but for one which is tranquil and ordained to match the character of his intelligence." The ordaining thereof is

effected by the providence of God by means of His laws, whereby He knits together each society and its members. Hence, too, Aristotle (*Politics* i, 2) lays it down, and correctly, that speech, an instrument granted by Nature to man for the better establishment of Society, is fitly designed by Divine Providence for declaring what things are beneficial or hurtful, and what are just or unjust.

XVII. Further, some give such an interpretation to Natural Law as that it is susceptible of natural ascertainment and that its principles are congenital with man himself; and to that end the sayings of the Apostle in the Epistle to the Romans, chs. 1 and 2, are commonly cited, namely, *τὸ γνωστὸν τοῦ θεοῦ φανερόν ἐστιν ἐν αὐτοῖς* and *ὁ γὲ θεὸς αὐτοῖς ἐφανέρωσε*, "That which may be known of God is manifest in them, for God hath shown it unto them." And in the same place, *γνόντες τὸν θεόν, οὐχ ὡς θεὸν ἐδόξασαν*, "When they knew God, they glorified Him not as God." Also the passage, *τὸ ἔργον τοῦ νόμου, γραπτὸν ἐν ταῖς καρδίαις αὐτῶν*, "the work of the Law, written in their hearts"—a passage which is fully and accurately explained by Joannes Adam Osiander in a special part of his treatise, *Typus legis naturæ.* And very sound is the well-known division of Theology into Natural and Revealed; the former comprises all pious duties as well as the other Laws of Nature, "and in the light of Reason mounts from the things which have happened and are happening and are present to our senses up to the knowledge of God, its principles, like those of other philosophic systems, being planted in our minds by Nature." (These are the words of our well-known countryman Calixtus, *Apparatus theologiæ,* p. 3.) But what the nature of these principles is, and whether they are congenital with man, and, indeed, whether *ἑκτικῶς*, habitually, they are congenital—on these points there is no unanimity, but considerable divergence of opinion. Epicurus styles these principles *προλήψεις*, that is, Preconceptions; Cicero in different places styles them Notions (*Notitiæ*), and Sparks and Elements (*Igniculi et Semina*). Joannes Sperling, the renowned philosopher of Wittenberg, describes those Notions as being "States of mind (*Habitus*) induced from earliest infancy and impressed by Nature before the dawn of Reason," and he divides them into the Speculative and the Practical (*Dissertatio de principiis nobiscum natis,* ch. 1). But, with all respect to him and others, it does not seem to me correct to go so far as to say that such states of mind are or were innate in us in our infancy, for

> Cum ventum ad verum est, sensus moresque repugnant.
>
> (When we have arrived at the truth, our senses and characters fight against it.)

If, however, the knowledge of the entire propositions whereof the Laws of Nature consist be innate in men, every one would have one and the same notion about them, because the things that pertain to man by Nature pertain to him always and pertain to every one; but how differ-

ent the case really is, experience abundantly shows. Accordingly I hold the remarks of Balthasar Meisner (*Philosophia sobria*) much more consistent with the facts: "A controversy has arisen," says he, "about innate notions, which some deem to be nothing but the naked δύναμις (power) or faculty of recognizing God, directly Reason begins to show itself in man." So also with the remark of Timpler (*Systema methodicum metaphysicæ*), "The capacity and ability to acquire knowledge of principles is innate in man, but not that knowledge itself." And similar to this is what Piccart says (*Synopsis organi*), "Let us accept the conclusion that principles are not implanted in us by Nature, but that certain faculties are so implanted, by the aid (as it were) of which we may attain to the knowledge thereof." With these may be ranked the anonymous writer (a Belgian) of *Dissertatio epistolica de justo et decoro* (p. 73). And on this ground Guil. Grotius (*De principiis juris naturalis,* ch. 1, n. 5) interprets Nature as that natural working of God which is fixed in our minds and whose author is God.

XVIII. Now the views of the ancients on this matter are easily ascertained: for Plato tells in his *Philebus* how the cup of Lethe, or Forgetfulness, is given one to drink at birth, and that, when its effects have been counteracted by due education, we learn and, as it were, revive in our memory the common notions in question; and Aristotle (*On the Soul,* bk. 3) compares the mind to a cleaned tablet (*tabula rasa*), with no writing on it, but on which everything can be written. But as regards the Platonists, they seem elsewhere to postulate innate ideas of Natural Laws. Accordingly Cumberland, in his philosophic disquisition *De legibus naturæ* (*Prolegomena,* § 5), writes ingenuously and modestly as follows:

"I indeed have not had the good fortune to attain to the knowledge of Natural Laws by any such short-cut, and it does not seem reasonable to base the whole doctrine of Natural Religion and morals on that hypothesis (namely, the innate knowledge of Natural Laws) which has been rejected by the majority of philosophers, Pagan and Christian alike. But I have decided not to attack this opinion, since I heartily wish the utmost degree of success to anything which conduces to piety and good morals, it not being impossible that notions of this kind are born with us and then imprinted afresh in us from without."

XIX. And the Apostle's text does not father any other opinion, for Thomas Aquinas, in his commentary on that Epistle, gives the same interpretation concerning the internal light of the understanding, because that is the channel through which the will of God might be made manifest to the Gentiles. For as soon as flashes of reason begin to be utilized, first one and then another Law of Nature, exactly correspondent to the rational and social nature of man, emerges from time to time, and Right Reason, that is Prudence, adopts them in actual life—unless it

happen that, before Reason has attained through Prudence to perfection and ὀρθότης, the lures of pleasure and vice have encumbered its path and bad education, or none at all, or neglected, has checked in the blade the good crop of character. ἔστι γε κακία φθαρτικὴ ἀρχῆς, "For Vice is powerful to overthrow and destroy principles" (Aristotle, *Nic. Eth.* vi, 5, § 16, and 12, § 33; and vii, 8, § 12). And Cicero (*Tusculan Questions,* 3) makes the following lament on the matter:

"Nature has furnished us only with some few sparks, which we soon so extinguish by bad morals and depraved opinions that the light of Nature nowhere shines out. The seeds of virtues are connatural to our dispositions, and, were they suffered to ripen, Nature herself would lead us to a happy life; but now, as soon as we are born and received into the world, we are at once familiarized with all kinds of depravity and wrong opinions, so that we may be almost said to suck in error with our nurse's milk. And on our return to our parents, that is, when we are put into the hands of tutors and governors, we imbibe so many errors that truth gives place to falsehood and Nature herself to established opinion."

Cebes depicts this in his *Tabula,* where at the first of life's portals man is met by ἀπάτη, Imposture, πάντας τοὺς ἀνθρώπους πλανῶσα, seductress of all men, who sets before every one πλάνην καὶ ἄγνοιαν, error and ignorance. And hence it is that such various opinions on Natural Law have arisen, often very remote from one another, and that its investigation is so difficult and its precepts ascertained and promulged sometimes over-precisely, sometimes over-obscurely.

XX. We may recapitulate what has been so far said under three heads. First: The Law of Nature derives its origin and authority from Divine Providence. Second: Its rules and precepts are most fitly adapted to the rational and social nature of man. Do not let any one, however, think that human nature as stained with various vices is here meant, for, filth of this kind being contrary to the Law of Nature, it must be assumed that it is to unimpaired and uncorrupted human nature that God has adapted His laws; for although the upright soul has no difficulty in recognizing its faults, yet it is not wholly ignorant of the standard to which it should attain. Hence comes our Third proposition: The Law of Nature must in consequence be described as that which can be perceived and recognized by the light of Natural Reason; and it is therefore false, and rash babbling, whoever says it, that we can have no sure knowledge of the Law of Nature apart from Revelation, a doctrine contradicted by the Apostle himself where he declares the Gentiles who spurned the obligation of the Natural Law to be ἀναπολογήτους, inexcusable (*Romans,* ch. 1). To these, somewhat tardily, shall be added a Fourth: That this Law is consistent with Nature in the active sense (*Natura naturans*), that is, with God Himself, from Whose

Justice these rays of light issue. I would that these four essentials or properties of Natural Law were carefully noted and, where necessary, compared and conjoined one with another, for in that way we shall solve without much ado not only a number of trifling questions but also some which may seem difficult.

XXI. That being so, I am not a little surprised that so many have been found, ancients and moderns alike, not only doubting whether there be any Natural Law but also fighting against the idea with all the force of their mind. Such of them, forsooth, as have been tainted with atheism, and have gone about to banish all Natural Law from Society, have acted just like those whose lot it is to be the slaves of a proposition, θέσει δουλεύειν; as to the rest and those who have taken any other attitude towards the principles of Natural Law (of which more later), I can not divine what has come into their minds. Of the ancients, Archelaus, a disciple of Anaxagoras, has the following attributed to him by Laërtius: τὸ δίκαιον εἶναι καὶ τὸ αἰσχρὸν οὐ φύσει, ἀλλὰ νόμῳ, "Goodness and badness are not of Nature but of Law." And Laërtius, in his life of Aristippus, attributes to the Cyrenaics, μηδὲν εἶναι φύσει δίκαιον, ἢ καλόν, ἢ αἰσχρόν, ἀλλὰ νόμῳ καὶ ἔθει, "Nothing is by nature right or fair or wrong, but only by law and custom." And the Sceptics maintain in Sextus Empiricus' book against the astrologers, φύσει νόμων οὐδὲν μέλει, "Nature gives no heed to Law." The doctrine of Carneades, the Academic, I will give in the words of Lactantius (*Divinæ institutiones*, bk. 5, ch. 6): "Men have, on grounds of expediency, established for themselves laws which differ with differing character, and which are often changed in the same society according to circumstances; for there is no such thing as Natural Law," etc. The same thing was in Horace's mind when he wrote (*Satires* i, 3):

> Jura inventa metu injusti fateare necesse est;
> Tempora si fastosque velis evolvere mundi.
> Nec Natura potest justo secernere iniquum.

(That Laws were introduced through dread of injuries, one must needs confess if one search into the annals and records of the world. Nor can Nature effect the severance of right from wrong.)

Even worse than these are the Χειροδίκαι, those who measure Law with their hand, and who propose to associate the two utterly opposite things Might and Right; this is what they say: ἀνδρὶ τυράννῳ ἢ πόλει ἀρχὴν ἐχούσῃ οὐδὲν ἄλογον ὅτι συμφέρον, "For a monarch or for a state that exercises rule, there is nothing that is absurd or inconsistent with right and reason, if only it be expedient" (Thucydides, bk. 6). The Spartans made the same mistake, and Plutarch says of it in his *Agesilaus*, "The Spartans place the first principles of rectitude in what is expedient for their country, and neither know nor teach any other law than such as may increase the welfare of Sparta." And this the Athenians made a matter of

reproach against them, "The upright, in their view, is the pleasant, and the just the expedient." Nay, even Aristotle himself has the following passage in accordance with the view of certain ancients (*Nic. Eth.* i, 3, § 3): "In those matters which are honest and just, so far as politics is concerned, there is such a variety and so much that is tentative that they seem to be founded not on nature but on the will of man." When Epicurus had forsworn Divine Providence, he imbibed the same poison; Cicero refutes him, *De legibus* 1. Lactantius refutes Carneades, and so does Grotius in the *Prolegomena* to his *De jure belli ac pacis*.

XXII. What, except the hypothesis of atheism, can have led some to such absurd views of the Law of Nature is a question correctly dealt with by Bachov, a philosopher and jurist second in merit to none. Commenting on *Inst.* 1, 2, 1, he writes that, since they had observed that the laws of different peoples were not only diverse, but even contradictory, in regard of matters for which the Law of Nature had provided rules, they had ended by denying with headlong rashness the existence of Natural Law at all. Mevius enumerates additional reasons in his *Prodromum* (insp. 2, n. 2, p. 51). And this same point seems to have moved Aristotle; for, after raising for himself the objection that, while the things which are by Nature are immutable, yet the Law of Nature is seen to take different shapes among different peoples, he lapses into the rejoinder that at any rate Law would be immutable among the gods (*Nic. Eth.* v, 7, § 5). Thus, warlike races held it not only lawful, but a matter for boasting, that they made the neighborhood unsafe by their robberies. "Robberies committed beyond the borders of each state bring no disgrace," says Cæsar of the Germani. μητρομιξία, incest, was not reckoned foul among the Persians. The most absurd and loathsome idolatry commended itself to the Egyptians, for they made deities not only of τὰ πετεινά, τετράποδα, καὶ ἑρπετά, things winged, four-footed and creeping (on which see the Apostle, *Romans*, ch. 1), but also of the leek and the onion. And what shall I say of the frightful sacrifices usual among the Phœnicians, Gauls of old, Massagetæ, Tauroscythians, Derbices, Arcadians, and Ionians, and at the present day among the Mexicans, Peruvians, and other Indians, who offer up their own tender children? or of the cruelty of the Japanese, who on the advice of their Bonzes (priests) either procure abortion or smother the newly delivered fœtus? or of the foul lust of the Chinese, who defile themselves with perverted passion? In some places it was honorable for young girls to obtain a dowry by debauchery. Among the Spartans there was no crime of adultery. "There is on record the saying of one Geradas, a Spartan of the olden days, made to a guest who enquired what the penalty for adultery was in Sparta. The answer was, 'The adulterous guest is not known among us.' 'But suppose he made his appearance?'

retorted the other. Geradas said, 'He would atone with a bull big enough to lay his head across Taygetus and to drink at the Eurotas.' And when the other exclaimed in surprise, 'How can there be so big a bull?' Geradas rejoined, 'And how can there be an adulterer in Sparta?'" The passage is in Plutarch's *Lycurgus* (p. 80, edition by Herman Cruserius). And theft, no matter how craftily carried out, was deemed by the same folk an excellent *προγύμνασμα*, or preliminary training, for the art of war. And so if any one were caught in the act of theft he received a terrible thrashing; and Plutarch tells, in the place quoted, how in his time he had seen many young men die while being beaten for that offence on the altar of Diana Orthia. This discipline was so successful that an instance is adduced in which a person had carried off a young fox by theft and had wrapped it up in his cloak and, when the beast tore at his belly with its claws and teeth, he bore it, so as to avoid detection, until he swooned away. Such disgusting blemishes as these disfigured the laws of Lycurgus and of others, whether codes of Law or systems of Morals, and cases of detestable license were developed—further details of which I abstain from giving, because any one reading the ancient or modern history of geographical discovery in this or in earlier centuries can not avoid coming across frequent instances. (See Plutarch, *On Isis and Osiris;* Juvenal, *Satire* 15; Strabo, bk. 8; Herodotus, bk. 1; Diodorus Siculus; Julius Cæsar; Ovid; Lactantius; Tertullian; Theodoret; Hugo Linschotten; Joseph Acosta; Aloysius de Cada Mosto; and Ludovicus Vartomannus.) George Calixtus, in his *Epistola theologica moralis* (pp. 49 onwards), has collected from these and other writers a compendium of that kind of horrible wrong-doing.

XXIII. If what has been said above be thoughtfully examined, I think it will furnish a refutation of those who have such impious opinions about the Providence of God and Natural Law. For I do not think any one will be found rash enough to deny that man is by nature a social animal; nor do I think there will be any one to deny that the bond and buttress of every form of Society is Law of some kind and that community of Law is inseparable from community of Society. So, too, I think there will be none to deny that there are certain Natural Societies, that is to say, Societies towards the formation and perpetuation of which an instinct has been implanted in man by Divine Providence and the capacities needed for this end added. And so I conclude that there will be no one who, granting the existence of certain Natural Societies, will yet contend that they have been left destitute by Nature of the bond of Law. For if Providence designs an end, namely Society itself and the community of advantages offered by each society after its kind, surely It has also bestowed that gift without which those ends can not be attained or retained, namely, that everything should move forward with a definite observance of Law and in an ordered fashion, and be shared

by the members of the society without hurt or breach of peace and concord. I hold that none of the premises can be denied without absurdity, and trust that every one whose brains are not addled will affirm them. The force of this argument was properly perceived—so excellent was his wit and judgment—by Alexander of Aphrodisium, ὁ ἐξηγητής, " the Interpreter," and I will here add a few words taken from his *De anima*, bk. 2, although the whole is well worth reading: " If we be by nature social and given to make common cause with one another, yet it is impossible for a society to continue without Justice, Law, too, must be by Nature. And they who, because Law differs from one people to another, deny that it is by Nature, impliedly admit that that is by Nature which is the same among all peoples." Seneca confirms this (*Epistle* 48): " No one can live a happy life who regards himself alone and twists everything to suit his own advantage; you must live for others if you want to live for yourself. This Society must be scrupulously and reverently respected, which merges each one of us in the whole and shows that there is a law common to the human race."

XXIV. Clear as this truth is, there are many who surround it with clouds to the darkening of its light. Carneades would measure all Law by the standard of Utility alone, but has already been refuted by Lactantius and Grotius. It is, indeed, true that Natural Law is of extreme utility in uniting societies and holding them together and preserving them. If, however, you made the false assumption that man is not by nature social, and does not found societies by means of arbitrary convention one with another, yet the Law of Nature would adapt itself to Man's Rational Nature because of that Probity which is one of his distinguishing characteristics, and would compel him to pursue this Probity and to avoid its opposite. This is what Aristotle means by the passage (*Rhetoric* i, 13) where he says, " There is by Nature, as all agree, a universal Just and Unjust, even apart from any social union or agreement between man and man." Sharrock, too, has a good remark on this matter (*De officiis*, ch. 2, n. 10): " It is very true that these preconceptions exercise great force in the preservation of societies, and that accordingly great gain comes to men from them; but Utility has followed on Probity, itself a gift of Nature, and not Probity on Utility."

XXV. There are others who have been driven by the force of truth to an opinion concerning man which accords with the fact, namely that he is by nature a rational and social animal; yet they seek to weaken it by the sophistry that man is not a social animal actually, but only in aptitude. It is admitted that potentialities must in Nature precede activities, but let man freely produce such activities as can issue from his natural potentialities. Since man, then, has received from Nature the inclination to Society, he is also led by his appetite into social acts. Were he to do otherwise he would quit his human nature, says Aristotle

(*Politics* i, 2, towards the end), and pass into either a god or a beast. Now man is born a baby, and the use of Reason develops gradually, and he does not attain to it all at once; yet he is from the beginning fitted by nature for Society, and in such sort that he will soon actively seek Society and enter into it, and by social acts bind others to himself and himself to others. And God has so deeply rooted this instinct in the mind of man that none but a monster would desire to resist this Divine ordering and appointment, since we perceive that it is not impressed upon certain individuals merely but is an attribute of human nature as a whole.

XXVI. Now since Nature does nothing purposelessly and abhors a movement towards indefinite ends, it needs must be that human appetite should find repose in some definite good of which that same Nature is the originator, and which can be no other than the natural ends of each Natural Society. Accordingly, man being driven by Nature to seek Society, he seeks with special keenness the ends of Society, and, Natural Societies being some more perfect than others, and their ends being subordinated to one ultimate end, he seeks with especial keenness that end and supreme good of the most perfect Natural Society, namely, εὐπραξία (Right Conduct) and the performance of what is naturally right. The social appetite of man, accordingly, is not satisfied by the chance attainment of any social life whatever, but only of such as God has fixed for the social and rational life of man, and as Reason herself marks out for him. Granted, then, that he seeks Society, for one thing, because of his dislike of solitude and, for another, because of his fear of danger and hurt, yet it can easily be inferred from what has been said that a much nobler end still is presented to his nobler side.

XXVII. But some will object that this means that the Law of Nature takes its rise in the mere inclinations of human appetite. I hold, however, in the light of what I have already advanced, that this conclusion is a clumsy one: for the end to which human appetite is driven by the promptings of nature has been fixed by Divine Providence and not at the choice of man; and as it consists in such πράξις, Conduct, as is consistent with human nature and this end, and as it is attained by correspondent actions, which conform to all these rules of Natural Law, it is abundantly certain that these last-named are sanctioned by God and that they have been promulged for the use of uncorrupted Reason at the instance of Him from Whom comes the gift of Reason.

XXVIII. Grotius, accordingly, seems to receive a punishment which he does not deserve, when Robert Sharrock and others take exception to that saying of his, somewhat inaccurate as it may be, that the care of Society is the source of Natural Law. Let his words, if they seem of so much importance, be read (*De officiis*, ch. 2, n. 10). You will nowhere find that Grotius treats the quest and care of Society as the *only*

sources of Natural Law—by this little word Sharrock perverts Grotius' teaching, and Osiander seems to have followed him blindly, saying (*Observations* 4, on Grotius' *Annotations* to his *Prolegomena*), " It is not quite accurate to say that the care of Society is the source of Natural Law, especially if you give these words an exclusive meaning." Now the qualification which, as I insisted in section XX, above, must also be taken into account wherever needed, Grotius did not mean to be left out of account, as is clear to every one from the context of his words. And their assertion that the care of Society applies alike to a good and to a bad Society rests on a false assumption, for Grotius, by his remark that the Laws of Nature are indicated by the rational and social nature of man, did not of course refer to such a society as, say, thieves may form with one another, but utterly excluded it as incompatible with the rational nature of man himself. Nay, if we are going to be accurate in our philosophizing, a concourse, crowd, and mass of ill fellows of that kind do not deserve to be called a Society at all, as we shall show later. When, then, Osiander proposes to amend Grotius by saying that the source of Natural Law is God Himself, he has, not only the assent, but also the prior pronouncement to that effect, of Grotius himself; for here are his words (*Prolegomena*) : " Although Natural Law, or the social law in question, flows from principles internal to man, it can yet be properly ascribed to God." And shortly afterwards (*De jure belli ac pacis,* bk. 1, ch. 1, n. 10) he refers Natural Law to God, the author of Nature; and, in his *Annotations* to the passage just quoted from the *Prolegomena,* he confirms this by the testimony of Chrysostom and Chrysippus.

XXIX. Some employ the following argument to controvert the existence of Natural Law, namely, that man has been made a social animal by God, but with conditions of free-will, and that the Law thence derived is, therefore, voluntary. For that which is by nature just must of course have been such antecedently to the will of any freely acting law-giver, so that he can only will and require that which is already by nature just, and not anything which by the free determination of his will has for the first time become just. If, then, I grant that man might have been created a rational animal and yet at the same time in conditions of freedom and without social appetite, it does not, however, follow that after God has seen good actually to create man no less social than rational, the Natural and Social Law is voluntary. For the existence of this Law is not solely dependent on the social nature of man, even though it may be more clearly observed and surely proved from that standpoint. Its author, indeed, is God; now, although on our hypothesis He had created man under free conditions a social animal, yet at the time when He created him rational and communicated to him a particle of Divine breath, the Natural Laws, like rays emitted from the essential Justice of

God, were in themselves ever and from eternity just, and as they are in the highest degree suited alike to the rational and the social nature of man, and as God has actually created man social, it was not possible for man not to be bound to the performance of those social acts which were due by the Law of Nature. A similar argument for rejecting a Law of Nature was used by Joannes Szydlovius, of the Reformed Church, with whom Osiander (*Typus legis naturæ,* th. 21, onwards) has a lengthy discussion; nay, that doctrine, from which none but most absurd and detestable opinions flow, deeply displeased even his brethren Rivet, Voet, Maresius, and Amyraldus. Let us hear a brief discussion by Amyraldus on this matter, taken from the preface of his *Specimen animadversionum in Frid. Spanhemii Emendationes de gratia universali,* p. 95:

" Some theologians have held, and not the least renowned ones, that Vice and Virtue do not differ in their nature, and that whatever distinction can be drawn between them comes altogether from the entirely free will of God. This is both false in itself and instinctively abhorrent to the human mind. But over and above its fearful character, it has as a necessary consequence—who can help seeing it?—that God was free not only to lay down for us no laws about Virtue and Vice, without the restraint of which our minds and appetites would have roamed at large, but also to enjoin on us an unrestrained indulgence of our affections. Now had He done this, would that which we to-day call Virtue have been a pious and sacred thing? Nay, horrible to contemplate, God might, according to this egregious doctrine, forsooth, have required man to pursue His Divine self with bitterest hate! That dogma, indeed, does not merely throw on religion a stain, but is the very destruction of religion and a broad road leading to the utterest and most hopeless impiety."

XXX. I have said that the Law of Nature is adapted to rational and social human nature; I now add that it is also consistent with the Divine nature. For because man was made in God's image, which, on the interpretation of the Apostle, consists in Justice and Holiness, God has decreed from eternity that man should imitate in his conduct the Divine justice and goodness. Now inasmuch as Divine Providence directs each and every thing [to an end *] which is agreeable not only to the thing itself, but also to the Divine goodness and glory, there was from eternity a certain rule shaped in the Divine mind which all things, and man most of all, should follow and submit to, and in accordance wherewith Providence would order the care of the universe and especially of human actions. That rule is commonly styled the *Eternal Law of God.* For the mind of God conceives naught save from eternity, seeing that if God were to conceive anything novel, or unusual, or in time,

* Some such words as *ad finem* have been in error omitted from the original text.—TRANS.

His knowledge would be changeable, Whose discernment nevertheless penetrates everything to the innermost.

XXXI. Just as that Law of God is lauded as eternal, so it is also immutable: for God, by reason of the infallibility of His knowledge, persists ever in the same will, nor can His decrees be varied by any one when sanctioned as a perpetual rule and order; and so, had not that primitive image of God been obscured in man by sin, he would everywhere, according to the Eternal Law of God, have yielded obedience and satisfaction to the Divine will. I believe that this Eternal Law of God is what Plato means by *αὐτοδικαιοσύνη*, which he held to prevail among the gods; and kindred views seem to have been held by his disciple Aristotle (*Nic. Eth.* v, 7, § 6). Cicero deals more plainly with the same topic and deserves a hearing. "I see," says he (*De legibus,* bk. 2), "that it was the opinion of the wisest men that Law was not the invention of human wits, nor anything in the shape of a popular decree, but an eternal something ruling the universal world with a wisdom which displayed itself in commands and prohibitions; and, accordingly, they held that that Law, alike in its primary and in its ultimate parts, was the mind of God, Who compels or forbids everything consistently with Reason, which is the source of the Law given by the gods to the human race." And, a little later on, the same writer says, "Eternal Law took its origin in the Divine mind; wherefore Law of the true and prime variety, fitly directed to the issuing of commands and prohibitions, is the Right Reason of most high Jove." He also says, "Law, in the highest sense, is the Divine mind." And in his *De finibus* there is this passage to the same effect: "Law, truly and in the highest sense so called, is said by the philosophers to be Reason appropriate to the nature of God." St. Augustine, in his book *De catechizandis rudibus* (ch. 18), says that the Eternal Law of God is unfolded by means of those "most harmonious laws of a marvelous disposition whereby God has it in mind to rule His creatures." And in his book *De libero arbitrio* (bk. 1, ch. 5), he uses the following descriptive phrase: "Eternal Law and Reason residing in the mind of God, whereby all things are by the appropriate means directed to their respective ends."

XXXII. Between Divine Providence and Eternal Law there is, accordingly, a very close relationship. The former directs each and every thing to the end which is agreeable to its nature, whatever that may be, and also to the Divine goodness, and takes a special charge thereof; the latter constrains these same things by a compulsory obligation each to its own end. Yet men, being endowed with intelligence, are bound in a different way from that in which those things are bound which are created void of reason, the latter being brought to compliance by a natural necessary inclination, while man's compliance is conjoined with freedom. Although, therefore, everything, save God, is subject

to this Eternal Law, yet it has not the essential quality of a precept except in respect of free and rational agents. The rays, accordingly, of this Eternal Law are those Natural Laws which Reason, that particle of the Divine breath, indicates to us and urges upon us and promulges; and hence it is that what the Law of Nature enjoins or forbids is not, respectively, good or bad merely because God has of His free will decided to enjoin the one or forbid the other; but, because the former is in its essence wholly good and the latter wholly bad, God could not but forbid this and enjoin that. So that in this way you can understand also how this Divine Law of the Natural kind differs from Divine Law of the Arbitrary kind. (Grotius, *De jure belli ac pacis,* bk. 1, ch. 1, nn. 10, 15; Guil. Grotius, *De principiis juris naturalis,* ch. 3, n. 2.)

XXXIII. Logical arrangement seems to require that a definition of Natural Law be now given, very various definitions having come down to us, as given by various persons. Among these not the lowest place must be assigned to that of Grotius, to be found in his book *De jure belli ac pacis* (bk. 1, ch. 1, n. 10), namely, " Natural Law is a dictate of Right Reason indicating that there is in any given act, according as it is in agreement or disagreement with rational Nature itself, a moral necessity or a moral baseness, and consequently that such act is enjoined or forbidden by God, the author of Nature." The points in which this description may be found lacking will be pointed out elsewhere; meanwhile I will use the opportunity to give the following description according to my own views. The Law of Nature is a law moving from Divine Providence in harmony with the idea of Eternal Law, and adapted to the rational and social nature of man, which, being promulgated in man's mind by means of Right Reason, binds him to conform his conduct to the standard of this Law and so to attain happiness. Various other definitions, propounded by other persons, lie scattered about, some of which, such as those of Gregory de Valentia, Tanner, Martin Bonacina, Robert Sanderson, and others, are set out and examined by Osiander in his *Typus legis naturæ* (th. 42, onwards).

XXXIV. I will give fuller elucidations of the individual parts of this definition, so that the nature and properties of this Law may appear more exactly, and that a judgment may be formed whether my definition is put together according to logical rules. From the outset let me say that I do not recognize any distinction between Law of Nature and Natural Law, and that I do not agree with Mevius when he refers the former to the Eternal Law of God and the latter to man (*Prodromum,* insp. 2, n. 5). Now as regards my definition: all Law being correctly divided into Natural and Positive (*Legitimum*), I have made a proximate genus of Natural Law, because it is a variety of Law, or one of the species of Law if Law be taken as a genus, and also is properly styled Law in that it obliges. The division of Natural Law into Obligatory and Permissive

must, accordingly, be rejected; and I am surprised that, among others, even Selden has adopted this division (*De jure naturæ et gentium juxta disciplinam Hebræorum,* bk. 1). For obligation is, on Selden's own showing, the head and soul of Law properly so called, and those things which have not been placed under the rule of Natural Law, but have been left, as matters indifferent, to the discretion of man, are exempt by this Law from the constraint of obligation; and so they ought not to be labelled with the name of Law at all. Guil. Grotius agrees with me herein (*De principiis juris naturalis,* ch. 2, n. 10; and ch. 3, n. 3).

XXXV. You may reply that the division in question is supported by a greater authority still, that of Modestinus, who says (*Dig.* 1, 3, 7): "It is the virtue of Law to command, to forbid, to permit, and to punish." Nay, if our philosophy be real, and not sham, we can not admit this at all nor satisfactorily defend it; for I think that a passably good rendering of the virtue of Statute or Law (*Lex aut Jus*) is the power and authority to oblige, displayed either in express commands or in prohibitions, and punishment serves as a subsidiary defense and weapon to laws of both kinds, commands and prohibitions alike, so that, while Statute or Law primarily obliges to do or abstain from doing, it secondarily obliges the disobedient with punishment.

XXXVI. Further, on a correct estimate of the matter, Permission will not be found part of the virtue of Law or Statute. For, in the first place, we must insist that the permitted be carefully distinguished from the commanded and the forbidden: some matters there are, relating to human conduct, which no law either imperative or prohibitive has determined; and accordingly, as human freedom is not restricted in regard of them, they are commonly styled "allowed" and "permitted," and in Greek ἀδιάφορα ("indifferent"). About the ambiguity of the word "allowed" (*licitum*) or "to allow" (*licere*) see Guil. Grotius, *De principiis juris naturalis,* ch. 2, n. 9. It is clear to every one that, as things of this kind are not "permitted" by force of any legal sanction, the correlative "permission" can not be a virtue of Law; and so Mevius (*Prodromum,* insp. 2, n. 7) is right in reminding us that there is a world of difference between Natural Law and Natural Liberty. In some cases τὸ *permissum,* the permitted, is contrasted only with the forbidden: thus, for example, the Divine Law (*Leviticus,* ch. 18, v. 18) forbids a man to take to wife the sister of his wife in the latter's lifetime; and from this Sanchez and others deduce the permissibility, by Divine Law, of marrying the sister after the wife's death. But so far as regards the virtue of Statute and Law, the character of the Permission, so derived by inference from its opposite, is consistent with the foregoing; for, although I may be able clearly to perceive from that prohibitory enactment what the Lawgiver's intent is, namely, that He means to place marriage with a deceased wife's sister among things permitted, still this does not come

from the virtue of Law as if there were a law in any way obliging to such marriage, but without any legal determination the matter is in such a case as this left to human discretion, unless it chance that some supervening law of the arbitrary type relating to such a marriage has curtailed natural freedom of action. Least of all is the virtue of Law to be credited with the things commonly called Permitted or Allowed because, although essentially unlawful (*injusta*), they happen to go unpunished in human courts. With this, to a certain extent, compare the well-known maxim, " Not everything that is permitted is right " (*Dig.* 50, 17, 144), If, however, some statute were to sanction what is in this way permitted, so that a right freely to act in that way was thereby created and one so acting could not be prevented without wrong—as, for example, if a lawgiver were to enact that the hunting of wolves was to be free and open to every subject—that permission would undoubtedly spring from the virtue of the law, for a statute of that kind creates an obligation that nobody shall interfere in that matter with him who proposes to devote himself to the pursuit in question, and accordingly that statute is framed (so to speak) prohibitively, as regards everything which it intends to place among the things so allowed and permitted as that no one can lawfully be hindered in doing them. Some strive to extricate themselves from this position by drawing a distinction between Permission in point of fact and Permission in point of Law. They say that God permits many sins—a case of permission in point of fact—by not preventing their commission, while permission in point of Law involves the negation both of prohibition and of command. Then they further consider permission in point of Law under a double aspect, as may be seen in Osiander (*Observations* on Grotius' *Annotations* to his *De jure belli ac pacis,* bk. 1, obs. 3, th. 9). Of course, in matters also which are simply indifferent and not the subject of legal determinations, one person can not interfere with another without wrong-doing; here, however, the legal sanction is not of a special kind, but an offense is committed against the Law of Liberty which prevails generally.

XXXVII. It may, too, be possibly the case that there is some distinction between, on the one hand, To be permitted or allowed, To permit or suffer a thing to be among things permitted or allowed, and, on the other hand, expressly To order that a thing be permitted. The former is not properly within the scope of legislation and law, because there is no sort of correlation between (1) Obliging and (2) Suffering to be among things permitted; but it is within the competence of legislation to bring a thing within the permitted by means of a command, because legislation is then dealing with things permitted as a separate whole in regard of which a definite body of law is laid down. Things permitted in this way are an external object of legislation in such fashion that the permission involved in this sort of law contains an obligation and forbids the

use of force towards, or the creation of hindrances in the way of, one who proposes to do that which the law has permitted, that is, has decided not to be unlawful. This is what Grotius propounded in the following short passage: " Permission is not properly an activity of the Law, but is the negation of activity except so far as other persons are put under an obligation not to let or hinder him who has received the permission " (*De jure belli ac pacis,* bk. 1, ch. 1, § 9). Accordingly, it is not correct to employ, in cases where a permission coupled with a legal sanction is given, the appellation Permissive Law in contradistinction to Obligatory Law, because, as I have just shown, an obligation is implicit in that legal sanction. For if it is your pleasure either to admit this variety of classification or to follow Modestinus, you will have to put not only Permissive Law in a separate class but Imperative Law also, and Prohibitory Law and Punitive Law, an inelegance which can not commend itself to the advocates of ἀκρίβεια, precision. (See also Bœcler on Grotius, bk. 1, ch. 2, § 9.) Guil. Grotius (*De principiis juris naturalis,* ch. 1, n. 10) refines so nicely as to say that there is more in To grant (*Concedere*) than in To permit (*Permittere*), and on this ground he divides the Law of Nature into Præceptive and Concessive (ch. 7, n. 1).

XXXVIII. Nor can I countenance the classification of Natural Law into Primitive and Secondary, not only because it has been resorted to in defense of that error which led Ulpian to admit brute animals to a share in Natural Law, but also because it is void of all solid reason. Further, since, in my *Prolegomena* (§ 9) to Cicero's *Offices* and elsewhere, I have pointed out why this classification is inadmissible, and since our own definition given above shows that the obligation of Natural Law extends to man only, no higher value is to be put on that other classification of Natural Law into Animal and Rational, seeing also that Hugo de Roy started that falsity for the purpose of correcting an old blunder (*De eo quod justum est,* bk. 1, tit. 2; Mevius *Prodromum,* insp. 2, n. 3). For, inasmuch as I have shown beyond challenge (*Disputatio de jure in genere*) that brute animals are incapable of Law properly so called, it follows that no obligation of Natural Law and no share in it can possibly be extended to them. (See also Salmasius, *De usuris,* ch. 9.)

XXXIX. Now, please, let us see what case Hugo de Roy makes against this in his little book, *De eo quod justum est.* " To start with," says he, " some one objects, ' It does not deserve the name of Law, because it is void of reason.' Granted, for that is quite true. But no argument can be based thereon against our (" Animal, *animale* ") branch of Natural Law; for that is not void of reason, not even on its own merits, because none of God's handiwork is done without reason." He grants the truth and in the same breath contradicts it. For who can ever doubt that all things have been created by God with the utmost wisdom and consummate reason, inanimate things no less than animate? but that

they thereby become indiscriminately sharers in reason and in Law, which is indissolubly associated therewith, is absurd. Perceiving this, our author continues as follows: "Perchance some one will contend that what we have said about reason in Law is not satisfactory and will call in addition for reason in those for whom Law is instituted. But that contention is inadmissible within the bounds of any Law, not to say Natural Law, because one does not look for human reason in the animals in which that Law is instituted and implanted, but only for a capacity to receive the notions or aforementioned principles of Law and a corresponding degree of perfection such as is found and perceived alike in brutes and in rational beings." He says that the natural principles in question can be referred to a single ultimate head, "To love themselves and their own things," this containing within itself all the rest: such as, to defend life, to protect the body, to desire the procreative union of male and female, to take care of offspring, to follow the good and avoid the bad, to choose what will profit and refuse what will hurt. Aye, but the contention in question is most sound and it is quite false that there is no Law the subject-matter of which requires a share in reason. For Law, properly so called, curtails or determines in a definite manner freedom of action; but freedom of action necessarily implies reason, and as brutes are not endowed with this they also lack capacity for any Law whatever, and especially for Natural Law. And although some brutes seem to act like men, yet what they do is not done with reason or of free choice, even if it be done ἀχαλίνως, without a bridle, but of mere natural inclination and of necessity. Hence it comes that brutes resort to all modes of defense, without any law or breach of law (*Dig.* 9, 1, 1, 3); but man's modes of defense are lawful or unlawful, or partly one and partly the other. Brutes copulate in order to procreate, but it is without honor or the vice of adultery, or dishonor or incest; but man is bound by Natural Law to perform these and similar acts conformably to the rules prescribed by the lawgiver. If, then, any one denies human reason to the brutes, he must also deny them all human Law; but the highest type of human Law is the Natural, adapted, as it is, by God's consummate wisdom to the rational nature of man alone. If, however, you propose, like Hugo de Roy, to give the name of Reason to the inclination of the brutes towards the acts just specified, and to hold them capable of Law by reason of that inclination, you are making a play on words and misusing the names both of Reason and of Law, inasmuch as all who discuss these philosophic questions ought from the outset to be minded to pursue the essential qualities of things and words, and not the analogies, some of them very remote, of Reason and Law. There is, therefore, more correctness in the explanation of these matters given by Ritterhusius when writing on Oppian's *Cynegetus,* p. 28. His words are: "The jurisconsults defined Law in the manner indicated, not because they were so foolish as not to

know that Law could not truly and properly be held to exist where reason was not, but because they wanted to show that there is no surer proof that a given matter is part of Natural Law than the fact that men do it under the guidance of reason and brutes do the same thing by instinct and inclination and the impulse of nature." A similar interpretation is given by Gerhard Johann Voss (*De origine et progressu idolatriæ,* ch. 61). Mevius (*Prodromum,* insp. 2, p. 57) makes the frank admission: "Those of the older jurists who attributed Law to animals either were led into error by zeal for their school or else improperly described what they beheld in animals, namely the raw material, or image, or shadow, of Law."

XL. Hugo says that, alike in brutes and in man, that perfection is seen which is appropriate to them; and this is true: but perfection in man is not the same as in the numerous kinds of brutes; and it does not follow that if beasts, each after its kind, have received perfection from Divine Providence, they are therefore as capable of Natural Law as men are. Nor, because brutes are observed to love and defend themselves and their own, and so forth, by instinct of nature, are the following remarks of Hugo true without qualification: "These things are by nature just; they are good and right for all animals"; and a little later: "Of a truth it must not be asked of Natural Law or of any existing Law at all, whether its operation is dependent on natural inclination or on human reason; but what is to be looked at is, whether it is good and just in itself. For what Nature has taught all animals can be taken to mean in the special case of man an operation by means of reason, but in the case of other animals an operation by means of natural inclination; yet all the same, each of these tends towards the same end of Nature and the same goal of Natural Justice." Every one can see that all this depends on a wrong assumption. True, each and every thing has been created by Divine Providence for an end appropriate to itself and has been equipped with the internal impulses necessary to attain this end; and if even brutes attain their end, this is their Good, the End and the Good being materially the same thing (*Nic. Eth.* i, 1). And although a certain kind of Justice, also customarily styled Equity, comes to us under the name of the Equitable Good, it is nevertheless ridiculous to propose to confuse this Equitable Good with the final good of brutes and to claim on that ground a share in Law and Equity even for brutes. But much the falsest position is this, that, for the purpose of distinguishing the Law of Nature, or indeed any other variety of Law, and of distributing matters between them, it makes no difference whether the matter in question is done in virtue of natural inclination or in virtue of reason. And although some of the acts of brutes and of men seem to be directed to the same end, yet that end is not in an unqualified manner the same or attained by both in the same fashion; for men strive towards the end

which Nature has set before them in a lawful fashion, and the end is a lawful one, while in the case of the brutes neither the fashion nor the end is assigned to them by Nature under the guise of Law properly so called.

XLI. What need of more? Our author is making a play on ambiguous words and phrases. For when he attributes a share in Law to brutes, he does not mean Law properly so called, such as we have and ought to have in view; and over and above this he is continually confounding Natural Law with the Eternal Law of God, which even brutes in their fashion attain to. Accordingly he asserts that traces of obligation and of Law are discernible in brutes, though jurists have been reluctant to admit that brutes can act in a lawful way or in breach of Law, in the proper sense of these terms; that while other animals, void of reason, are constant in their duty, man, the animal endowed with reason, deviates from his duty and commits daily faults; that he does not merely believe, but knows of a certainty, that in addition to the common endowments of a common nature man is into the bargain endowed with the noblest principles of Right Reason, together with his rational soul; that Natural Law is in a noble fashion an endowment of man; and that, in dealing with the Law of Nature, he (the author in question) does not mean that law which is a matter of morals, and is a gift bestowed on the human mind also, as such, for the purpose of discerning good from evil and of distinguishing between the equitable and the inequitable, the just and the unjust, the honorable and the base. If, then, on Hugo's own confession, the brutes are not capable of Law properly so called, and if the Eternal Law of God obliges, in strictness, those only who have the use of reason and are free agents, while it directs the brutes to their several ends in a very different fashion—why on earth does he wrangle?

XLII. Fortunius Garcias, the Spanish jurisconsult, distributed Natural Law into the Governed (*Gubernatum*) and the Governing (*Gubernans*), the former of which he attributed to the brutes and the latter to men. He assigns as the reason of the former position that the control exercised by Natural Law is not to be attributed to the brutes, but to God Who governs all, and he assigns as the reason of the latter position that man is possessed of reason and it is under its guidance that he does all the things which are considered to belong to Natural Law. This distinction pleases Hugo de Roy more than all the others, but he finds ground for taking exception to it in the fact that, although all things obey Reason and consequently those things, too, which belong to Natural Law, yet God, Who governs all, controls that same Reason no less than the natural instincts of the brutes. This criticism is sound and destroys the distinction itself; for, if all things be entirely and in a paramount fashion shaped at the pleasure of God, Who assigns to the whole its bounds, then Reason will likewise be within the sovereignty of Divine

Providence and all Natural Law will so far be "Governed" (*Gubernatum*). Although even the brutes have received their natural propensities at the hands of God, and Divine Providence maintains them in the case of each and directs them to their appropriate ends, yet the activities of the brutes aroused or consummated by this instinct are not to be styled Lawful (*justæ*) except by a play on words; nay, they are not capable of Natural Law, or of any other Law properly so called, even though the impulses, propensities, and activities in question are in harmony with the Eternal Law of God. Why, many folks seem to think that one error must be covered up with another, lest it let the rain through! If they would employ the same amount of zeal in the search for truth as they do in busying themselves with the defense of deep-rooted error, their teachings would be far more correct.

XLIII. As to the Reductive (*reductivum*) or Negative variety of Natural Law (often contrasted by some with the Positive variety), see Guil. Grotius (*De principiis juris naturalis,* ch. 2, nn. 1, 4, 5, 6), as also for the doctrine that some of the dispositions of the Law of Nature are Directive, others Coercive, and for the doctrine that one variety of the Law of Nature exists ἁπλῶς, Simply, and another Conditionally or dependent on some assumption. And for that other distinction, according to which the Law of Nature either illumines the intellect or obliges the conscience, see the same writer (ch. 4, n. 1). And the doctrine that some things belong to the Law of Nature positively, others privatively, is to be found in Mevius, *Prodromum,* insp. 2, n. 6, where he asserts that this distinction is commonly received.

XLIV. After the discussion of all these, there remains that true and noteworthy classification of Natural Law into General and Special. Each of these binds none but men, as is clear from what has gone before; but there is this difference, that the former binds all men, simply as men, no matter in what Society they may be living; while the latter does not in an absolute manner bind all men who are included within universal human Society, but all those who are within some special Natural Society and who are mutually bound one to another, in modes varying with the diverse nature of such Societies, by reason of the special necessities of the case or because of regard had to the peculiar duties of the Natural Law. Such Societies are especially the Conjugal, the Paternal and that of Master and Servant, and the Civil Society which springs from these; of these I will say more in the sequel.

XLV. I have admitted that all the Law of Nature is received from Divine Providence, and its bindingness must also arise from the same source, so that any who deem the appetite for Society and the preservation of Society to be the sole source of Natural Law will be wrong. For if the obligation of every law derives its authority in paramount fashion from God, Natural Law receives its authority in the highest possible

degree from that same source, as I have shown at some length in my *Prolegomena* to Cicero's *Offices* and in my *Disputatio de jure,* th. 11. But because man not only is driven to the creation of Society by various external causes, but his desire for Natural Societies is especially due to an implanted appetite—and in point of fact, Nature has bestowed this craving upon man just in order that he might be aware that those Societies of his are clearly appropriate to his nature and that he might find repose by obtaining happiness and completeness within their bounds —man has at the same time equipped those Societies with a definite Law and Order, which exactly correspond to his rational nature, with the intent to live in them among his kind honorably and happily and with all possible pleasure. I am, accordingly, not content with the genealogy of these matters which Sharrock draws up, namely, "Want, the great-grandparent, begat Fear; Fear, the grandparent, begat Society; Society and the care thereof begat precepts of duty, and in so doing quitted herself well as mother to Natural Law" (*De officiis,* ch. 2, n. 10). For it was God Who created man a Rational and naturally Social animal; and it was He Who formed Natural Societies, and that for the Good of man; and, in order that this Good might be really such, and not be commendable from the standpoint of objective utility alone but be complete and lasting, He willed that man should join himself to his fellows in Societies by a definite Law and all be mutually bound to one another.

XLVI. It can be gathered from the foregoing how great is the obligation of Natural Law and how high its authority; for Aristotle, in a passage above quoted, declared that it possesses everywhere the same force, just as fire burns alike among Greeks and among Persians and in any other part of the earth. Hence he and other Greeks called this Law *κοινὸς νόμος* or *τὸ κοινὸν δίκαιον,* Common Law (*communis lex, commune jus*); to Cicero and Apuleius it is the Common Law of humanity; to Seneca, the Common Law of the human race; to Cornelius Nepos, the Common Law of the world (*commune jus gentium*); to Demosthenes and Isocrates and Quintilian, the Common Law of all. To this topic belongs the passage in *Rhetoric* i, 13, pr., *ἔστι ὃ μαντεύονταί τι πάντες φύσει κοινὸν δίκαιον καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ᾖ, μηδὲ συνθήκη,* "There is something which all acknowledge to be by nature universally just and unjust, even though no societies and no pacts have been entered into one with another." For, inasmuch as the various departments of this Law are impressions of Divine Justice itself, and Divine Providence has cast upon human appetite, which possesses freedom, an obligation in the interests and for the good of man himself—in such sort that by following this rule he may attain true and solid happiness—and has created all these things in the shape most appropriate to the rational and social nature of man, Reason itself feeling and recogniz-

ing and understanding the manner of their promulgation, how that little by little and one after another the impulses of the intelligence gather strength, it is a proper conclusion that these laws, simply in virtue of their quality, bind all men without exception.

XLVII. Accordingly Justinian, following others, has very truly remarked (*Inst.* i, 2, § 11) that the Laws of Nature are not only observed among all peoples alike but are by Divine appointment "ever firm and immutable." Aristotle, too, saw the same thing but could not properly appreciate the reason because of a certain inconsistency of his in matters touching Divine Providence. The passage which he borrows from Sophocles is very remarkable and harmonizes with the quotation given in my immediately preceding paragraph: οὐ γάρ τι νῦν τε κἀχθές, ἀλλ' ἀεί ποτε ζῇ τοῦτο, κοὐδεὶς οἶδεν ἐξ ὅτου φανείη, "For it is not something of now and to-day, but ever has been and none knows whence it came" (*Rhetoric* i, c. 13). What profit, then, was there in all your knowledge, my Philosopher, great and marvelous as it was, if you were as much in the dark on this matter as Sophocles was? The Eternal Law of God was from eternity in the mind of God, but its preëminent part, Natural Law, began to be declared and promulged with the appearance of the race of man; and the obligation thereof, which began to take effect at the same time, will last as long as the human race itself. Aristotle was apparently ignorant of this, yet reckoned himself to have grasped aright that "The ordered universe is from everlasting."

XLVIII. Nor does Marcus Antonius Majoragius deserve attention when writing, in his comment on the aforementioned passage from the *Rhetoric*, that in his opinion our Philosopher did not mean by δίκαιον τὸ κοινόν (Common Law) to refer to the Law of Nature alone, but also to the Law of Nations; his reasoning in support of that position is weak and can easily be refuted by a careful collation of Aristotle's text. This Law, then, is so firm and immutable that even God has no wish and no power to change it: no wish, because Providence has determined to rule Its Natural Societies by this constant Order; and no power, because it is entirely congruent with the Justice of God that human actions should take their course in Societies in accordance with this Law and Order, in such sort that if a withdrawal from that Law took place there would inevitably be a violation of Divine Justice—now Divine Justice is of God's essence, and God will not go counter to Himself. Much less, therefore, can man, whoever he may be, whether governor or governed, change aught herein; nay, not even the whole human race can change an iota, not even if gigantic Impudence were madly to conspire against God. Cicero (in *Lactantius*, bk. 6, ch. 8) says admirably on this topic: "This Law"—it is Natural Law that he is speaking of—"can not be set aside without sin; nor may it be derogated from in any particular; nor can it be wholly set aside; nor can we be freed from its control, either by Senate

or by People; nor are we to seek any to make it clear or any other interpreter; nor will it take one shape at Rome and another at Athens, or one shape now and another hereafter. But one Law, eternal and immortal, shall bind all peoples at every point of time; and there shall be in common one master, as it were, and lord of all, God, the framer of this Law, Who also pronounces on it and puts it into force. And whoso does not yield to it obedience will be trying to escape from himself and contemning the nature of man, and in that very fact will be undergoing the severest penalties, even if the other punishments which are ordained pass him over." Here, of a truth, is something worth its weight in gold and worthy of attentive consideration, for there is not an ineffective or exaggerated word in it.

XLIX. Osiander will have seen, then, what degree of truth and justification there is in the remark which he makes with such assurance, both in his *Typus legis naturæ* (th. 44, 45) and in his *Observations* on Grotius' *Annotations* to *De jure belli ac pacis* (bk. 1, ch. 1, th. 10, obs. 5), namely, that the Law of Nature in the state of innocence is not the same as the Law of Nature in the fallen state. Herein, unless I err, he has come to grief through defining the Law of Nature as Habituation (*habitum*) and saying that it resides like something habitual (his own word) in the mind of man, the result being that he does not contemplate the Law of Nature in itself and in the abstract, nor the mind of man as it ought to be, but the latter in a corrupt state and the former (habit, forsooth!) contaminated and, so to say, submerged by a flood of vices. Nor can we follow Martin Schoock (*De jure naturali,* th. 56) in drawing a distinction between the Universal and the Particular precepts of Natural Law, the former being incapable but the latter capable of change; for it is impossible, says he, that the general principle, "Good is to be done and Bad is to be shunned," should be utterly blotted out of the mind of any man, even if some men or peoples hold that there is no disgrace in theft or adultery, and the like. Now we shall soon see what opinion is to be formed on these points. Gratian, too, is exceedingly ridiculous when, in *Decretum,* dist. 5, he proclaims the immutability of the Law of Nature, yet seems straightway to have changed his opinion—if indeed the words which we read there be really his, namely, "While Natural Law is said to be contained in the Law and the Gospel, certain concessions are now found to be made which are contrary to what is laid down in the Law; so it does not seem that Natural Law can be allowed to be immutable. For in the Law it was laid down that a woman must not approach unto the temple for forty days after bearing a male child, and not for eighty days after bearing a female child, yet nowadays she is not prevented from entering a church immediately after childbirth." And he continues with other matter equally unsupported and unworthy of refutation.

L. Nor can any objection be based on acts done contrary to the Law of Nature, some examples of which I have set out above. For in such cases attention must be directed not to what is actually done but to what ought to be done, there being all the world of difference between Fact and Law. What Cicero says about Nature in his *Tusculan Questions* is in point here, " Custom will never conquer Nature, for it remains ever unconquered." And a careful distinction must be drawn between that which, in the guise of Standard and Rule, is prescribed to Conduct and Conduct itself, which, when closely examined in that way, sometimes conforms to the prescription and sometimes is very much at variance with it. We have, accordingly, to distinguish very dissimilar things from one another, namely, Law itself and the observance or the neglect thereof. Inasmuch, then, as human Law is not changed merely by the contrary behavior of those who may happen to be subject to it, much less does the Law of Nature admit of change in that fashion, even if whole peoples, corrupted by bad custom, behave contrary thereto. This and the foregoing remarks may be illustrated by the inimitable discourse of Socrates on Natural Laws, given in Xenophon's *Memorabilia,* bk. 4:

" ' But, Hippias, do you know any unwritten laws? '—' Those,' said he, ' observed alike in every country.'—' Would you be able, then, to assert,' said he, ' that men have enacted them? '—' How can I? ' said the other, ' for they could never all come together and they do not all speak the same language.'—' Who, then,' he asked, ' do you think made these arbitrary laws? '—' My opinion is,' was the reply, ' that the gods made these laws for men, for among all men it is a fundamental law that the gods must be worshipped.'—' And is it not everywhere enjoined to honor our parents too? '—' Yes,' said the other, ' it is.'—' And is it not also laid down that parents should not associate with children, nor children with parents? '—' This, Socrates,' said he, ' no longer seems to me to be a law of God.'—' Why? ' he asked.—' Because I see some,' he said, ' who transgress it.'—' And yet,' said he, ' they transgress many others; but then, they who transgress the laws framed by the gods pay a penalty which man can in no way escape, as do some who transgress the laws framed by men, either by lying hidden or by the exercise of violence.'—' I agree with you here too,' said the other.—' Well now, is it not in harmony with the laws of the world at large to return good to those who do good to us? '—' Yes,' said he, ' but this, too, is transgressed.'—' Aye, and those who thus transgress pay a penalty.' "

And the following passage in *Magna moralia,* bk. 1, ch. 34, is also noteworthy:

" Some of the things that are Just are so by Nature, others by Law. But in our consideration of the matter we must avoid the idea that it can never happen that those which are by nature do not admit of change. For take the case of throwing: imagine that we all always use the left

hand; well, we have the use of the left hand just as much as of the right hand, still it is the left by nature. Now the right hand is naturally stronger than the left, yet we are now doing all the work with the left, as if it were the right. Although this change can be effected, that does not mean that it is not by nature; and it is equally true that if things go on as much and as long as possible without change, with left left and right right, that too is by nature. So it is with the things that are by nature just: there may be a change in our use of them, but that does not mean that they are not just by nature; nay, the opposite is the case. For what continues in the highest degree unchanged is clearly just by nature, and what we have appointed and decided by law is just too, and comes to us as just in virtue of its legal origin. What is just by nature excels, then, what is just by law."

If this passage be Aristotle's it deserves to be compared with what we read in *Nic. Eth.* v, 7, § 5 and onwards, namely:

" What is by nature is immovable and unchangeable and has the same authority everywhere, just as fire burns both here and among the Persians. But people see the rules of justice continually altering. Yet this is not altogether true, although it is true to some extent. Among the gods, indeed, it is probably not the case at all; but however this may be, among us, although there is such a thing as Natural Justice, yet it varies, but not wholly. Notwithstanding this, however, there is a Justice which is natural, as well as a Justice which is not natural. Further, within the class of things which can happen in different ways and which admit of change, it is easy to see what and what kind of a thing it is that is by nature, and what kind it is that is not by nature but is by law and convention, even if both kinds be alike variable. The same distinction will apply to other matters also: thus, the right hand is by nature stronger than the left, and yet it may happen that some persons are able to use the left hand quite as well as the right."

Thus Aristotle, whose views we have elsewhere set out more plainly.

LI. Let us then agree that, in Cicero's language, as regards the Law of Nature there can not, either through contrary practices or by human sanctions, be "*Abrogare*," that is, the undoing and repeal of the whole extent of the Law's obligation; nor "*Derogare*," that is, the taking away of some part of its obligation by a new law (*Dig.* 50, 16, 102); nor "*Obrogare*," that is, the introduction of a new law for the purpose, according to Festus, of annulling it, or, according to Ulpian (*Inst.* 1, 1, 2), of effecting a change in it; nor "*Exrogare*," that is, according to Festus, the taking of something away from it by a new law. But it is competent for man, within the limits of prudence or at any rate without rashness, "*Surrogare*," that is, make an addition to Natural Law by legislation. This matter will be dealt with in detail later on. (See also

Barnabas Brisson, *De formulis,* and Gœddæus on the aforementioned *Dig.* 50, 16, 102.)

LII. Some objector may set up against me the authority of the jurisconsult Ulpian, who (*Dig.* 1, 1, 6) says clearly that Civil Law of the arbitrary type can not only add to Natural Law but also subtract from it; and the objector may think to fortify his position by using as an illustration the treatment of nude pacts at the hands of Roman lawgivers, who would not allow them to support an action and to that extent deprived them of their natural obligation. Now as regards the first of these points, it is notorious that those matters which pertain to natural liberty are ordinarily added by some to Natural Law, and, when these persons realized that the matters in question were not subsumable under the Law of Nature properly so called, the custom began of dividing the Law of Nature into Obligatory, or the Law of Nature properly so called, and Permissive, or the Law of Nature so called καταχρηστικῶς, by a misuse of language. When, then, the jurisconsult says that the Law of Nature can suffer subtraction at the hands of Arbitrary Law, this will be most aptly interpreted as referring to the Permissive portion of this Law; for example, by nature any one has license to hunt, but that license has been curtailed by positive Civil Law and human freedom to that extent much restricted. Again, the second of the two points just mentioned presents no difficulty to us. For, although we can not go with Franciscus Connanus in his assertion that the natural obligation of pacts does not include rights of action, yet it does not follow thence that the obligation of Natural Law is destroyed by Arbitrary Law; for pacts individually considered, such as (say) Titius makes with Sempronius, form part not of Natural but of Arbitrary Law, even if their obligation be based on the general precept of Natural Law, namely, that good faith must be kept when pledged and embodied in a pact. This further observation must be made, that pacts are laws made by private persons, and their contents can not derogate from public laws or the authority of the lawgiver. And it is, indeed, far from true that the whole obligatory force of pacts is annulled and destroyed even if the lawgiver does, by positive enactment, hinder and prohibit that natural obligation from having some given civil effect, such as the right to bring action on it in a Roman court; for natural obligations are not all of the same kind, and Roman Law has hitherto allowed to some of them many civil effects, even though taking from them all effectiveness to base an action in a Roman court. For example, what is due under a natural obligation can be set off (*Dig.* 16, 2, 6); can be the object of an agreement to pay (*constitutum*) (*Dig.* 13, 5, 1, 7), or of a novation (*Dig.* 46, 2, 1, at end); and if paid can not be recovered on the ground of payment in error (*Dig.* 44, 7, 10; and 12, 6, 19). Further, an obligation of this kind will support suretyship (*Inst.* 3, 20, 1) and pawn (*Dig.* 20, 1, 5).

Other natural obligations there are which clearly receive no positive aid from the Civil Law, such as that arising on the acceptance of a benefit and binding one to make ἀντίδωρα, return-gifts (*Dig.* 5, 3, 25, 11; and 47, 2, 14, 1). And so Cicero, in his *Pro Plancio,* says "a debt of gratitude is one thing and a debt of money is another"; and Seneca (*De beneficiis,* bk. 3) explains the matter as follows: "To show one's gratitude is an honorable thing; but such a return ceases to be honorable when it is compulsory," that is, if it can be claimed by action. In the same way a promise made by one who has been interdicted from the management of his estate is, in Roman Law, so utterly void of obligation that it will not even support suretyship (*Dig.* 45, 1, 6); and there is no greater force allowed to a compromise about aliment (*Dig.* 12, 6, 23, 2); and, although an actionable obligation arises when a woman takes on her another person's debt, yet there is the perpetual plea of the *Senatus Consultum Velleianum* ready to slay the fœtus directly it is born (*Dig.* 12, 6, 40; and *Cod.* 4, 5, 9). All this makes it clear that natural obligations were not wholly disregarded by the Roman Civil Law, but that some were quite unaided by Positive Law, yet others were allowed certain effects in a civil court, while other effects were denied to them, but so that, nevertheless, the performance due under these natural obligations was left to the conscience and moral sense of the individual and not utterly destroyed.

LIII. Is Natural Law so immutable as to allow no room for Dispensation? Before answering this question the meaning of the word must first be explained. To dispense (*Dispensare*) is to relax in certain cases the obligation of the law, which, apart from this, is couched in universal terms and is therefore of universal obligation, and to suspend the force and operation which it would otherwise have in those cases. From this it immediately appears that this is a thing such as can not occur against the will of the lawmaker, nay, that the power of dispensing is bound up in an inseparable union with the lawmaking power and is competent to none but the lawmaker. As far, then, as the question before us is concerned, it follows that it is not lawful and right for man, at any rate, to arrogate to himself dispensing power in connection with Natural Law, even though Usurpers may aspire to the contrary, or he who poses as God's vice-regent on earth. When Dionysius of Syracuse was attempting incest on his mother and striving to put his own power above the Law, she made answer, that he could change Civil Laws but not Natural. And that was a fine speech of Titus Quintius to the ambassadors of Antiochus as given in Livy, bk. 24: "To pay regard in our deliberations, either mainly or solely, to what is honorable, befits the chief people of the earth and so great a King." But even God Himself, for the same reasons as I laid down a little while ago, has neither desire nor power to employ dispensation in these matters; for this would mean

that God, sometimes at any rate and in certain cases, would be hindering the operation of His own Law, nay, of His own Justice, which is absurd and involves the contradiction of saying that He is God and yet that, at any rate in certain cases, His essential attribute ceases and expires, and is as good as saying that in those cases He both is and is not God. Hence it is manifest that the vice-regent of God already referred to is arrogating to himself an authority greater than the Divine authority itself and is iniquitously applying it to the infringement of God's eternal will and immutable Justice. These considerations also show how ill they provide for themselves and their own interests who, while alleging polygamy to be against the Law of Nature, yet, when the examples of holy men of old are thrown in their faces, are wont to fly to the sacred anchor of Dispensation, as if God, Who on their own showing absolutely forbids polygamy, should have been moved in individual cases somewhat to relax the Law of Nature in favor of the persons referred to; that is, should have deprived His own eternal and immutable Justice of its necessary operation. This, forsooth, is what happens when one false position has been taken up—many others necessarily follow.

LIV. It can scarcely be told what great and numerous errors this discussion about Dispensation has bred. For William of Ockham, Andreas de Castro Novo, Gerson, Petrus de Aliaco and others have maintained that God could dispense with regard to all the precepts of the Decalogue, and therefore with regard to the Law of Nature, too; and they have been led to that doctrine by this argument more than any other, namely, that there is nothing which in itself is bad or good, but that good and bad are to be reckoned such merely because of the free pleasure of God; and Joannes Szydlovius, mentioned above, not long ago served up a hash of this most pestilent doctrine. There are also adduced, in illustration of that kind of alleged Dispensation, examples from Holy Writ, as Naaman's time-serving in the house of Rimmon, oaths allowed to be taken by creatures, the Sabbath ordinance relaxed, Jehu's taking up arms against the King and royal family, Abraham's slaughter of his son and Samson's self-slaughter, Hosea's joining himself with a whore, the Israelites' borrowing at their departure vessels of silver and vessels of gold, and midwives' earning rewards by lies.

LV. Joannes Duns Scotus, while misinterpreting the word Dispensation, held dispensation to be absolutely inadmissible as regards the commandments of the first Table of the Decalogue—this being limited, however, in the case of the commandment concerning the Sabbath day, to its positive element—but admissible as an act of Divine Power as regards the second Table. Durandus agrees only so far as concerns the fourth * and fifth † commandments, differing as regards the others whether positive or negative. John Major is inclined to admit the

* In usual English numbering, fifth. † In usual English numbering, sixth.

possibility of dispensation in the case of all the positive commandments, but not in the case of the negative ones, with an exception of the fifth,† about doing no murder. Thomas Aquinas taught a sounder doctrine and was followed by Dominicus de Soto, but so that a difference arose on this matter between the Scotists and the Thomists, the latter asserting that the whole of the Law of Nature is inviolable by dispensation; and this view is defended against the first-named school by Cajetanus, Richardus, Tostatus, and Ludovicus Molina among the Papists and, among the reformers, by Cregut and the Anonymous Writer, a Belgian (*Dissertatio epistolica de justo et decoro,* p. 52), and by our countryman Meisner and a number of other pious and learned men.

LVI. I have recently observed that even good Homer has nodded, the fact being that Mevius, in his *Prodromum* (insp. 2, n. 38), inculcates a great error, namely, that " while the Law of Nature is immutable, this does not mean that it is so erected above God, that God is subject to it and is unable at times to obtain good by means of evil "; and a little later on he says, " By a dispensation God can allow what otherwise is naturally bad; nay, can enjoin the doing of it—much more, do it Himself." This is something too coarse (φορτικόν), and I regret it has fallen from a man otherwise so excellent. Nay, I would not have touched this sore, had there not been the danger that a reader would be infected or at any rate offended by it. Now the Law of Nature is not so framed that, by reason of its internal quality, it can ever cease or fail; nor can the human mind utterly forswear it or drive it out of the conscience; nor can it be abrogated by any external human force; nay, it does not admit of change either in whole or in part at the hands of God Himself, even if men " hold the truth in unrighteousness " (*Rom.* 1, 18) or arraign His absolute power. For God never will nor can use this power so as to allow or approve sins and go counter to Himself and His own Justice, a thing absurd and impious to say. (See a lengthy discussion of this and a detailed reply to the objections raised in section LIV above, in Osiander's *Typus legis naturæ,* th. 48, and his *Observations* on Grotius' *De jure belli ac pacis,* bk. 1, ch. 1, th. 10, obs. 3, p. 180, onwards. Add also Grotius himself, place quoted, n. 10.)

LVII. Others adopt another line of attack upon the immutability of this Law. Granted, that Law furnishes a standard to human actions; yet—say they—there are infinite variations in the details and circumstances of these actions, in such sort that one rule of Natural Law is applicable in one case and another in another, and the same law is not applicable even to actions which in outward semblance are the same. Accordingly they conclude that the Law of Nature is itself variable. Now it is very true that human actions are liable to very many changes, yet it does not follow that the laws themselves, and especially Natural Laws, display corresponding changes. The admitted variety in actions

† In usual English numbering, sixth.

calls for a various application of the laws, but so as that the laws remain immutable in themselves and apart from the application of them. For to us the conceded variety in the application of Natural Law demonstrates or indicates that its obligation does not attach to widely dissimilar actions in one and the same way, but not that its obligation admits of variation in itself, so as at one time to operate and at another not, even if the actions are clearly of the same character. For, owing to this variety in human actions, the Law of Nature also is not equipped with one single rule, or with a few, but with very many; and Judicial Wisdom so interprets and applies these rules as to apply to each action its appropriate law, but without changing or altering the laws themselves. Now this Judicial Wisdom is not at variance with Legislative Wisdom, but the former subserves the latter, in such a way that, by the appropriate application of different rules to different actions, it rather conserves than alters the obligation of each and every law. For, in a word, to apply different laws to different actions is not to alter the laws, but to declare and pronounce what laws apply to what actions and the way in which and the extent to which any given law affects any given action, or includes it within its obligation. So necessary it is to discriminate aright between the objective material of Law and Law itself.

LVIII. What has been said makes it easy now to trace the differences between Natural and Arbitrary Law. The former derives its origin and authority solely from Providence; the latter from the free will of the lawgiver. The former obliges to an act or a forbearance in virtue of its own essential nature; the latter does so in virtue of a volitional decree and institution. The former binds every one; the latter does not do so in its nature. The former is immutable; the latter will often change. The former took shape in accord with the idea of the eternal Divine will; the latter is always adapted to the conditions of a state or to some other special or private good. The former dates back to the origin of the human race and will last as long as it; the latter has diverse times alike for beginning and ending. The former is promulged by God in the mind of man in a manner entirely peculiar to itself by Right Reason, that particle of the Divine breath; the latter issues, whether by word of mouth or in writing, from the express or tacit approval and will of the lawgiver, sometimes signified directly, sometimes through an intermediary channel. The former puts Probity before it as a preëminent goal, with the intent that just and honest conduct may be alike the means whereby man gets happiness and also the means whereby he keeps and uses it; the latter puts before it the nice considerations of Utility. (Gifanius on *Nic. Eth.*, bk. 5, ch. 7, the words *τὰ δὲ κατὰ συνθήκην*, in my copy, p. 404.)

LIX. We have seen how great the authority of Natural Law is and what a great difference there is in this respect between it and Arbi-

trary Law. Now just as the exceeding variety that there is in Arbitrary Law necessarily involves that one part of it often yields to another, in such a way that the authority of the worthier part admittedly breaks down the force and obligation of the lesser and either wholly or in part destroys or at any rate suspends it, so also the authority of Arbitrary Law as a whole is null whenever it is in conflict with Natural Law. (See the Anonymous Author, a Belgian, *Dissertatio epistolica de justo et decoro*, p. 18.) Now, as the power to make law, considered generally, issues from very diverse sources, the authority of the manifold varieties of Law can not but be correspondingly diverse. For it may be a case of equals being associated in an ordered union in virtue of a deliberate pact, or it may be a case of a superior binding an inferior in such a way that, the one party being under a necessity to obey, the other party is invested with a power to command. And, again, it may be a case of one man being the superior of others in such a way that he can ordain rules of law for them, yet being himself under the necessity to obey a third party. In the end, indeed, the matter comes to this, that the authority of the makers of all Arbitrary Law and Statute is subordinate to the empire of the Omnipotent and most Just Deity, in accordance with the poet:

> Regum timendorum in proprios greges,
> Reges in ipsos imperium est Dei.
>
> (The empire of dread kings is over their own peoples; the empire of God is over kings themselves.)

LX. It will be equally instructive and interesting to examine carefully some instances of that subalternation of Laws (if the phrase be permitted). Let us begin with Testaments. A testament is a kind of private statute (*Nov.* 22, ch. 2). And the utmost freedom of testation is desired, for there is nothing to which man is more entitled than that his pen should be free in the last expression of his will, whereafter there can be no other, and that his intent should be effectuated, which can no second time be framed (*Cod.* 1, 2, 1). But no one can provide in his testament that the laws are not to apply to it (*Dig.* 30, 55, and the examples thereof given by Dionysius Gothofredus). Accordingly, when a testator declared that the heir named in his will was not to avail himself of the *Lex Falcidia,* the jurist Papinian ruled that the provision of a private person can not derogate from statute (*Dig.* 35, 2, 15, pr.). Similarly, although the line to be taken in cases of doubt is that the utmost observance should be given to a matter contracted in good faith, yet the jurist Paulus suggests the qualifying condition that nothing in the document contravene the statutes (*Dig.* 34, 5, 21).

LXI. Now let us pass to Pacts, which also furnish an instance of laws made by private persons. These persons, when making such agreements with one another, ought to take care that there is nothing in them

counter to public statutes. For Public Law may not be infringed by a pact (*Dig.* 11, 7, 20), or be changed by a pact between private persons (*Dig.* 2, 14, 38). Accordingly, pacts entered into in contravention of the rules of the Civil Law are deemed null from the beginning (*Dig.* 2, 14, 28). For the Emperors Theodosius and Valentinian lay it down that they will not have any pact or agreement or contract carried out when the parties to it contract in defiance of a law which forbids the contract (*Cod.* 1, 14, 5); and the Prætor announces that he will not support pacts which are made contrary to laws or plebiscites or senatus-consults or imperial constitutions (*Dig.* 2, 14, 7, 7); and, generally, no pact that is repugnant to the Common Law ought to be observed (*Dig.* 2, 14, 7, 16). Much less can those pacts generate Law which are against good morals (*Cod.* 2, 3: 6 and 30; and 8, 38, 4; and *Dig.* 16, 3, 1, 7; and 24, 3, 14, 1; and 45, 1: 61 and 35 (1) and 134). And least of all have those pacts any obligatory force which have disgraceful contents or infringe the Law of Nature in any way. If, then, a promise be made in return for the other party's abstention from a crime, no obligation springs therefrom (*Dig.* 2, 14, 7, 3), for pacts which disclose a disgraceful consideration, such as an agreement not to commit theft or a personal outrage, are not to be observed, for it is the policy of the Law that the penalty for theft or outrage shall act as a deterrent (*Dig.* 2, 14, 27, 4). It is common knowledge that disgraceful stipulations are void (*Dig.* 45, 1, 26), for example an undertaking to commit murder or sacrilege; for the Prætor, as a duty of his office, must refuse an action to enforce such obligations (*Inst.* 3, 19, 23). Nay, pacts and conditions of that kind are rightly classified with impossible pacts and conditions; that is, we are supposed incapable of doing acts hurtful to piety or reputation or modesty or, to put it generally, against good morals (*Dig.* 28, 7, 15). Accordingly a man is not held to have committed default as regards a condition which he has perforce omitted to fulfil because it is of this character (*Dig.* 28, 7, 8, 7; and Guil. Grotius, *De principiis juris naturalis*).

LXII. Nor can magistrates any more than private persons enter into agreements of the kind under consideration; and so Hadrian gave a rescript that Public Law could not be changed by an agreement made by the Duumviri (*Dig.* 27, 8, 1, 9). The higher, then, the authority of any given lawgiver, the less may those who owe him obedience withstand or detract from his expressed will and ordinances. But dutifulness attains its greatest glory when respect and obedience are rendered to the Law of Nature and to its Author; for hereto the most highly placed Princes and States of the earth are bound, nay, the whole human race, without any right of gainsaying. On this is based the pronouncement of the jurist Pomponius that rights springing from blood-relationship can not be destroyed (*Dig.* 50, 17, 8); and so, although by the

Roman Civil Law marriage could not be contracted with slaves, but only the union called *contubernium*, yet the jurists warn us that respect must herein be paid to blood-relationship between or through slaves, because in contracts of marriage Natural Law and modesty must be taken into consideration (Paulus, in *Dig.* 23, 2, 14, 1; Modestinus, in *Dig.* 23, 2, 42; and in 50, 17, 197). Since, then, Law, according to Demosthenes, is a device and gift of God, and ought, according to Chrysippus, cited in *Dig.* 1, 3, 2, to be the measure of the just and the unjust, lawgivers, when making Arbitrary Law, should display the utmost care and anxiety and forethought not in aught to minish, or detract from, Natural Law. For if any laws which are opposed to that Law be introduced, Divine Providence forthwith intervenes and not only upholds the authority of its own Law but also deprives the laws in question of all obligatory force and compels those subject to them to contrary conduct. And if any lawgiver proposes to claim by tyrannical force authority for laws of that kind, that law, the higher it be carried, will only the more be a violation of Law, and the remark of the jurist Paulus will apply, "He acts against the Law who does that which the Law forbids" (*Dig.* 1, 3, 29).

LXIII. As, then, it not seldom happens that, among other laws well and wisely made, some are found which are repugnant to Natural Law—and instances of this occur even in the Roman legal system—lawgivers should be all the more cautious in proportion as this kind of fault becomes common. For in this matter lawgivers do not offend alone, but compel their subjects to offend too, by requiring them to obey laws of this kind. Aye, and they make their judges offend even more, for it is by reference to the standard of such laws that these persons examine conduct and pronounce on it when examined, and decree punishment according to the circumstances of the case, while all the time laws of this kind fail to furnish a true standard, and the framer of them

> Avius a vera longe ratione vagatur.
> (Wanders off the road and far from true principles.)

Hence a conflict often arises between Natural and Positive Law, between Equity and strict, rigid Law, and in the activities of the internal and the external forum; and which of the two competitors ought to succeed is easy of decision in a general proposition, but when we come to consider the special case, the water often refuses to flow and the conscience hesitates (Guil. Grotius, *De principiis juris naturalis*, ch. 2, n. 12). For it is easy to slip into the other way of thinking and make an erroneous estimate of Equity and Natural Reason, as Celsus long ago complained and as we have shown at length in our *Disputatio de æquitate*. (See Mevius, *Prodromum*, insp. 2, n. 20, onwards; he even approves of the subordination of Natural Laws—n. 43, onwards.)

LXIV. We will give some illustrations of the above topics. There is a town in Germany the local Law (*Statutum*) of which gives the inhabitants of the town a preferential treatment in case of an insolvency over all outside creditors. Now a certain widow had lent money to a citizen of this town, there being other creditors who were subsequent to her in time and in other respects; as she had, however, a foreign domicil, she had purchased a magisterial grant of citizenship. The debtor made himself bankrupt, and a contest arose among the creditors on the question of priority, those who were citizens of the town claiming that the widow ought to be postponed to them, although they relied on no other right than that of citizenship and were in point of time even subsequent to her. These claimants obtained a favorable decision from three benches of jurists on the ground of the privilege conferred by the local Statute, and also on the ground that the widow had not discharged all the local burdens and obligations like the other creditors who were domiciled there, and had therefore not come up to the full measure of a citizen. This decision was in my opinion wrong and utterly unjust: for had the issue been between this local Statute and the Law of Nature, there would have been little, nay, no difficulty in refusing the former any authority, inasmuch as it would conflict with that Law of Nature, one of the precepts of which is, Pay that thou owest. Now contractual advantages, so far as they are fixed by the Law of Nature, enure to the benefit of foreigners as much as to the benefit of citizens, and money loans ought to be repaid to both classes alike; and therefore, if there are several secured creditors of a citizen of that town, some of them citizens and some foreigners, and the former class of creditors have no other ground of priority than their citizenship, while the other class have priority in point of time, the rights of these latter, being also prior and stronger in virtue of their descent from the Law of Nature, can not be overridden by the mere local Law, unless you propose to enrich the former by wronging the latter (*Dig.* 50, 17, 206) or to reduce one party to an unjust condition through the medium of the other (*Dig.* 50, 17, 74). Among the grounds on which some creditors are preferred to others you will, on examination, find some which are approved by Natural Reason; but, at the bidding of a merely local law, to deprive a foreign creditor of a right conferred on him by the Law of Nature not only is unjust but argues ingratitude towards outside benefactors. Now let us come back to our special case: ought not the widow's right of citizenship, which she had obtained, aye, bought, from the magistrate, to advantage her at least to the extent of not being postponed by the mere local law to citizens over whom she had priority both in time and in law? For, although she had not borne all civic burdens, yet it can be retorted that, so long as she was domiciled and had the bulk of her fortune abroad, she was not in enjoyment of all civic advantages. May those

who differ from me bear my dissent with equanimity and give scope for the application of the Greek proverb, ἄφθονοι τῶν μουσῶν θύραι, *There is no grudging within the gates of the Muses.*

LXV. Suppose that a man, under the spur of a wrong done to him, challenges his opponent to the duel and kills him; it is often asked whether he ought to receive the usual punishment of the *Lex Cornelia.* If vengeance was the only motive of the challenger, then, as the protection of the courts was open to him, the Law of Nature pronounces that he ought to be visited with the penalty of life for life; but in usage and practice another course is adopted, and Carpzovius (p. 1, *Practica rerum criminalium,* 29, n. 75, onwards) supports this with his own opinion and that of many others. Seeing, however, that this challenge was prompted by a vengeance which is forbidden by all Law, and that a man ought not to take the Law into his own hands instead of using legal remedies, our opinion is confirmed as the more correct by Bachov on Wesenbec, *Ad legem Aquiliam,* n. 4, and Hahn on the same.

LXVI. It would be possible to furnish many other examples of this kind, for cases in which there is this conflict between Positive and Natural Law are repeatedly put before lawyers and judges for decision. And should you urge that a reason for all the institutions that have come down to us from of old can not be rendered, nay, that their reason ought not to be enquired into for fear of upsetting much that is settled (*Dig.* 1, 3 : 20 and 21), my answer is that I in no way persuade, nay I dissuade, any one rashly to abandon a rule of Positive Law, even though its reason be obscure or uncertain and though it produce some slight inconvenience: but if there be a manifest antagonism between it and a Law of Nature, I would have the authority of the latter prevail; and I assert that the authority of the former is then null and that judges ought in such cases to adjust their decisions to the Law of Nature and not to the Positive Law which is counter thereto. Jacobus Gothofredus says well (on *Dig.* 50, 17, 8) that the question whether Civil Law can ever derogate from Natural Law can really never be asked.

LXVII. Suppose that one of malice aforethought strikes a sound and healthy man with a deadly weapon, or shoots a bullet through him, or runs him through with a sword, and the victim forthwith falls to the ground and dies, and is buried without any inspection of the wound; the question is put whether the manslayer ought to receive the usual punishment of homicide. Many say " No," Carpzovius very emphatically. The Emperor Charles V, indeed, would not have the judges neglect the inspection of the wound, as appears from *Constitutiones criminales,* Art. 149; but if this Article be compared with Art. 147, it becomes clear that a distinction must be drawn according as there is any reasonable doubt whether the wound was or was not a deadly one. I do not dissent from the view that, although there should in both cases be an inspection of the

wound in compliance with the statute, yet if, in the latter case, where it is omitted, the victim dies immediately on being wounded, Natural Law demands the penalty of life for life; and I hold that they are wrong who on this pretext are content with a remission of the usual penalty. (See Brunnemann, *De processu inquisitorio,* ch. 7, n. 20.)

LXVIII. Some maintain that advocates ought to be on their guard, when proceeding against a man for homicide, to allege in their written accusation simply the fact of the killing without any particulars as to the manner thereof; for if they add these details, the accuser will have to prove not only the killing but also the manner of it. So far so good. But they go on to inculcate that if the allegation as to the manner can not also be proved, for instance, that it was done with malice aforethought, yet, despite the obviousness of the killing and of the guilt of the accused, the accused ought to receive an unqualified acquittal and not be subjected afresh to any charge or punishment by reason of his guilt, nay, can not even be sued civilly thereon. Now this is plainly repugnant to the Law of Nature. Yet this so-called " neat and golden caution " is commended as being " worthy to take deep root in the mind, in that it throws the burden of proof on the accuser, and this although it enables a man to free himself from the penalty of the homicide, no matter what degree of criminality there was in it." So says Berlich (p. 4, concl. 14, summ. and n. 2).

LXIX. When homicide has been committed, the manslayers and their advocates often proceed as follows: they compromise by a money payment or by other means with the widow or children or kindred of the slain person, and in this way the latter give up the accusation and their rights. Now, when this has taken place, some claim that the manslayer ought to be exempt from the usual punishment. But whenever this decision is come to, it is done without the consent of both the Law of Nature and Positive Divine Law, for a wrong of this kind amounts almost to a double affront, the one being offered to Universal Justice and the other to Particular Justice. Each of these demands redress, in such sort that a private compromise and arrangement can not prejudice the commonweal by preventing it from punishing a criminal for a breach of the Law (*Cod.* 7, 60, 2). And in order that manslayers may avoid punishment more surely still, some recommend this additional caution to them, namely, to have a magisterial confirmation of the private compromise. True, the Law of Nature does not raise any objection to this course; but, that a magistrate should lend his authority to a private compromise and arrangement to the detriment of public vengeance, this is counter to the Law of Nature. The iniquity of this proceeding is shown more fully by Oldekop (decad. 2, *Quæstiones ad processum criminalem* 1).

LXX. Reverting now to the definition (of Natural Law) given above, we find that one of the prime needs in connection with it is a careful explanation of Right Reason and of the way in which the Law of Nature is promulged by it in the mind of man (Guil. Grotius, *De principiis juris naturalis,* ch. 3, n. 5). For no law has obligatory force unless it has been promulged and brought to the knowledge of those who are to be compelled to obey it. This can be illustrated in the words of Ludovicus Molina (*De justitia et jure,* vol. 5, tract. 5, disp. 70): "Hence Promulgation, with which we are now dealing, not only is the pre-condition of the binding force of Law—just as the application of fire to tow is the pre-condition without which the natural force of fire, which exists in fire in a complete condition before that application, will not set the tow on fire—but also is a sort of complement of Law, and, to that extent, a complement of the force or virtue which Law exercises in binding those who are subject to it." What the nature of Right Reason is, I will set out briefly, having already elsewhere discussed the question more minutely. Reason or Intelligence signifies that human faculty which contains and possesses as its essence the power of reasoning and understanding; but that it is Right Reason, this it owes to its own inherent virtue, for the distinguishing characteristic of such virtue is that it perfects the faculty of which it is and is called the virtue, and equips it for the right and ready and easy performance of its functions. This Rightness, ὀρθότης, of Reason is not born with us, as is Reason itself, or the faculty of reasoning, but is acquired by industry and other means. And as Reason finds its scope alike in matters necessary and in matters contingent, and alike in matters active (πρακτικά) and in matters effective (ποιητικά), it requires for its Right operation on such diverse material not merely the perfecting activity of one virtue, but the coöperation also, in the production of that Rightness, of all those habits by means of which we can rightly arrive at truth, ἀληθεύειν, both in necessary and in contingent matters. Aristotle (*Nic. Eth.* vi, 3, § 2) enumerates five of such habits of mind; namely, Intuitive Reason, Science, Wisdom, Prudence, and Art. The three first-named of these complete the mind on the Theoretic side, so that it can duly ἀληθεύειν, attain truth, in necessary matters. Prudence completes the mind on the Practical side; I here use that phrase in its narrow sense, for sometimes it is employed in a wider sense to denote the Effective side, that, to wit, whereby the mind comports itself rightly in matters of conduct, determining what ought to be followed and what avoided—hence Aristotle says (*Nic. Eth.* vi, 13, § 17), "Right Reason is that which Prudence guides," and (§ 21), "Right Reason concerning such affairs is Prudence itself." Lastly, Art perfects the mind on the Effective side, so that it dexterously performs its creative functions. If, then, a classification of Right Reason be desirable, it will be a threefold one: Speculative, Practical, and Effective. Accordingly,

if Right Reason in an absolute and unqualified sense be attributed to any one, he must needs be completely equipped with all these mental virtues for the successful quest of truth in all departments, Theoretical, Practical, and Effective. When, then, certain philosophers limit Right Reason to the Practical side of the mind as equipped by the mental state called Prudence, they are only speaking of the underlying moral subject-matter with which they are concerned, for a wider outlook shows that the human mind is not perfected by this one state of mind as regards all departments, but only as regards matters of conduct, τὰ πρακτά.

LXXI. Now as the conformity of human conduct with Natural Laws is achieved not by Prudence alone but by Prudence and Moral Virtue, so, while Prudence promulges the Natural Laws and causes conduct to be guided by the standard they set up, it is by Moral Virtue that the appetite is led to render a perfect obedience to those laws. That is the teaching of the Philosopher, *Nic. Eth.* vi, 12, § 16: ἔτι, τὸ ἔργον ἀποτελεῖται κατά τε τὴν φρόνησιν καὶ τὴν ἠθικὴν ἀρετήν. ἡ μὲν γὰρ ἀρετὴ τὸν σκοπὸν ποιεῖ ὀρθόν. ἡ δὲ φρόνησις, τὰ πρὸς τοῦτον, "Further, the work is perfected by Prudence and Moral Virtue: Virtue brings it about that the end proposed is a right one; Prudence brings those things about which lead to that end." Now what, I ask, is here meant by the proper work, ἔργον, of man, and what is the character of his perfected work, ἀποτέλεσμα? Man's proper work is to live according to Virtue and Right Reason. ἔστιν ἔργον ἀνθρώπου, ψυχῆς ἐνέργεια κατὰ λόγον, καλῶς πραττομενή, "The work of man is to direct the activities of his soul in accordance with Reason and along lines that are good, or in accordance with Moral Virtue." (*Nic. Eth.* ii, 7, §§ 41, 43.) And the perfected work is known by the exact conformity of that human conduct with the standard set up by the Natural Laws. For just as the works of artisans which attain to the due standard are ordinarily called ἀποτελέσματα, masterpieces, so conduct which complies with the rule of Prudence and Virtue attains by that conformity ἀποτέλεσμα, full completion. ἕκαστον εὖ κατὰ τὴν οἰκείαν ἀρετὴν αποτελεῖται, "Every work is perfectly completed in accordance with its own peculiar virtue" (*Nic. Eth.* ii, 7, § 43). As, then, it is man's proper work to live honestly and justly by means of the virtues which are the peculiar attributes of his nature, namely, Prudence and Virtue, he also attains perfection in this his work under the guidance of these same.

LXXII. Some time ago, in my *Prolegomena* to Cicero's *Offices,* I discoursed of Right Reason and showed that, although man may be taught by it what things are by nature honest and just, yet it is not enough to deem that the bond of obligation which is inherent in Natural Law is fastened by it, but that bond must be carried back to God Himself as its prime author. A certain very learned person, who had read and approved this, nevertheless found me wanting in two respects—namely,

that I had not built on firmer foundations in § 46 and that in § 55 I recur in the end to God. The person in question had been treating of Natural Probity; and, after having set himself to seek for the criterion of Probity, he said that it could not be Right Reason, because Probity, on his interpretation, " carries with it a degree of obligation and binds men universally to act in a certain way and no other " (§ 14). A little later on he said that I had made it impossible to adduce sounder arguments, because in § 33 I had destroyed the basis of Probity, had confused the Law of Nature with Right Reason, had denied the innateness of common ideas, *αἱ ἔννοιαι κοιναί,* and had, with the aid of Thomas Aquinas, distorted the meaning and purpose of the Apostle; for (said my critic) Natural Law and Right Reason are two quite distinct things, the former including the most common practical principles implanted in us at our begetting, while Right Reason proclaims the conclusions which are deduced therefrom. Well, I am sorry that he has not sufficiently understood either his own or my remarks. In the first place he makes a mistake in interpreting Probity as always implying obligation; for although Probity and Justice are often conjoined in a synonymous manner, *συνονυμῶς,* yet in fact a distinction can be drawn between them, and ought to be drawn when circumstances require it, as previously pointed out by me in § 15 of the *Prolegomena* referred to. For almost the same difference is perceptible between Probity, properly so called, and Justice as exists between all the Moral Virtues and Universal Justice. (See my treatise *De justitia universali.*) In the next place, although it is true that Right Reason is distinct from the Law of Nature, yet our writer incrusts that distinction with a false explanation. For the Law of Nature is no less manifest in the conclusions to which it leads than in the universal principles on which it rests, and Right Reason means here the mind perfected on its Practical side by Prudence, which promulges to us all those Natural Laws which either are based on similar principles or lead to similar conclusions; and as to what he says elsewhere, namely, that God promulges Natural Laws every time that He allows them to be re-born in posterity by means of natural generation, that is subject to the same hypothesis but is not in my thinking the same thing. For, on his own admission, the lawgiver's will is manifested by promulgation, with the result that the laws so promulged begin to bind; and it would follow therefore that Natural Laws become known to man immediately on birth and from that moment effectually bind him, a thing which every one sees to be contrary to experience. Thirdly, I said that the origin of Probity and Natural Law can be made known to us by Right Reason, but that the commencement of the obligation which that Law contains must be traced to God Himself; and earlier I showed that this is possible if, to make use of Cicero's phrase, we rightly consider the dignity and end of our own nature—now this dignity of human nature lies in the

fact that it is Rational and Social. If, then—so I affirmed—man has formed a correct judgment with regard to the things which lead to the proper end of Natural Societies, and with regard to the duties and laws by means of which those societies are kept in continuance and in safety, and also with regard to the things which are adapted to his rational nature, this judgment supplies the rule and pole-star of Probity. How does our writer meet this? " Although these things show that men are moved and impelled towards Probity, they do not yet introduce any obligatory legal force at work." Now my primary purpose in the passage under criticism was to show how Probity and Natural Law can become known and be demonstrated to us by means of Right Reason; and, in order that man may respond to this demonstration and obtain the knowledge that he is finally bound to fulfil the correspondent duties, I brought him to God in these words:

" To the intent that men may perceive that this binding authority and necessary obedience must be most sacredly respected and observed by them, let them bear in mind that it is by the working of Divine Providence that they have received a nature not only social, but rational, and that, inasmuch as the ends of Society can not be compassed without the order and bond of Law, the contemners of this Law offend most grievously against God and call down His anger on themselves " (§ 55).

How does our critic receive this? " According to this," says he, " every man's remembrance that he has received from God a rational and social existence, is the ultimate foundation in his mind on which Probity rests." Really, I had not looked for that sort of verbal bird-snaring or the empty play on words which that passage contains; it looks as if nothing can be so well expressed as to escape all sophistical mishandling.

LXIII. I said that the knowledge of what things are by nature honest and just can be acquired by man under the guidance of Prudence and by a careful examination of the ends of Natural Societies. Let him not, however, imagine that it is left to his discretion to adapt his conduct to these ends, just as he likes or does not like—nay, in order that he may attain complete certitude that obedience and a definite course of conduct are imposed on him of necessity, I would have him diligently weigh and recall to his mind the fact that God is the author of Natural Societies and of their laws, and that it is He Who has implanted the social appetite in man, with the intent that man shall adapt his conduct to the ends of these societies—unless he proposes to forswear God and His ordinance and Laws and do violence and offer resistance to his own nature, and so fall into most grievous sin. All these matters are manifest in themselves and accordant with truth, and the whole of the present dissertation will furnish illustrations and confirmations of them. What, then, is the basis of the charge which is brought against me, that I have over-

thrown the foundations of Probity? This, that I would not admit that Natural Laws and principles of conduct, which are alleged to furnish the standard of Probity, are habitually innate in us. Now just as I do not wish to do violence to those who are satisfied with these opinions, so I also claim for myself full freedom of philosophic thought, and can not commit myself to an approval of what runs counter to my experience and intelligence; and I am, therefore, so far from wishing to wrench the Apostle's words from their true sense and bearing, that I prefer to expound their true sense and, with that intent, to adhere to Thomas Aquinas, than whom I doubt whether there has ever been a mortal man more subtle and exact in the discussion of human affairs. And yet it is not he alone, but hosts of others also who have arrived at the same conclusion about the Apostle's language and the principles of conduct, as may be seen from what I have said above in sections XVII and XVIII, and indeed so unmistakably that, alike whether I chose arguments or numbers as my weapon, I could acquit myself of the heavy charge of subverting the foundations of Probity. We are taught by Aristotle that although the desire for pleasure makes men easily fall into vice, yet the dogma that all pleasures are bad is indefensible, for a presumption of falsity is raised against it at the outset by the fact that even its author did not wholly abstain from pleasures; and, further, whatever truth it may contain is at the same time overthrown by *Nic. Eth.* x, 1, § 12. The same thing happens in the case of those who, in order to give their philosophy a firmer foundation and a freer course, repeat with confidence that the principles of conduct and Natural Laws are habitually innate in man; and they go so far in holding views which, on the abundant testimony of general practice and experience, as confirmed by the discoveries made by every one for himself, are so clearly inconsistent with what is and what has been ordained, that they who are content with this fabrication seem, on the one hand, to make their own position in the highest degree suspect and, on the other, to bring quite unjustly against me the charge of having laid insecure foundations for Probity and Natural Law. And so when our author in another place quotes these words of mine, " The system of governance and obedience is of Nature's ordaining, but it can not exist without *εὐνομία*, Good Order," he adds this question, " But if you reject the (habitual) innateness of Probity, what *εὐνομία* can you have?" I retort, What kind of logical consequence is there here? Let us return into the right way from our digression.

LXXIV. We have agreed that Prudence perfects the faculty called Practical Intellect, and Virtue the faculty called Appetite. Now perfection is in each case attained not at one moment, nor at one onset, nor as a complete whole, but slowly and by diligent efforts and diverse means and diverse stages. And just as Rightness of Intellect is thus gradually set forward by Prudence, and Rightness of Appetite by Virtue, and

each of them grows and develops by the aid of its own resources, so also the same stages and correspondingly patient steps mark alike the advance of Right Reason in the promulgation of Natural Laws, and the advance of Appetite, well trained as it has been by Virtue, in the yielding of its assent and of an easy and zealous obedience thereto. The stages of this advance would admit of more correct investigation and measurement if there had been prior scrutiny of the growth of Prudence and Virtue, their causes and methods. Now we have carried out that very scrutiny in two other dissertations, one *On Moral Virtue* and the other *On a Good Disposition*, περὶ εὐφυΐας, and both of them might well be embodied in the present dissertation, to the no slight illustration of its argument; but, in order to avoid seeming to wander too far from our subject and raising a grudge against us in the reader's mind, we propose to throw them in at the end of this dissertation, by way of make-weight, and to deal there with each topic separately and by itself.

LXXV. Further, as regards the promulgation of Natural Law, it is worthy of careful note that, while all Law is in the form of a general proposition and Natural Laws are unwritten laws, they are promulged by Right Reason sometimes in a simple and concise form and sometimes in a fuller form, and often in restricted form; for, although the following Laws of Nature are promulged in the mind of man in a general form—namely, Obey parents, Submit to magistrates, Return things deposited—still, if parents command something which is wrong and displeasing to God, or a madman requires the return of a sword which he has deposited, Right Reason limits and confines, by a reference to special circumstances, the effect of the promulgation of those laws and inserts in it conditions of Natural Law such as the following: Parents must be obeyed if their commands are not unjust, A deposited thing must be returned if no one is going forthwith to misuse it to another's hurt. The reason now is apparent why Aristotle said that Equity corrects Positive Law but not Natural Law (*Nic. Eth.* v, 10); for, since Natural Law is unwritten Law, it can not lack Equity, inasmuch as it can not be envisaged as a whole apart from all the exceptions to it, and, when these are also taken into the account, it presents itself to our eyes as self-sufficient. So says Guil. Grotius (*De principiis juris naturalis,* ch. 3, n. 11). Again, some Natural Laws are Commands, others are Prohibitions. Now the latter class does not admit of the exceptions or the limitations just spoken of, for the laws whereby adultery and theft, and such-like offenses, are base and always to be avoided are true laws, which admit of no exception. The Schoolmen, accordingly, used to put it as follows: The Negative precepts of the Law of Nature bind always and in all contingencies (*semper et ad semper*), but the Affirmative precepts, though always binding, do not bind in all contingencies (*semper sed non ad semper*). (Guil. Grotius, *De principiis juris naturalis,* ch. 2, n. 11; and especially ch. 3, nn. 9, 12.)

LXXVI. It may perhaps be urged that, if the promulgation and notification of Natural Law take place as indicated, it must always be uncertain, doubtful, frail, and unstable. If any one looks at the matter rightly, he will see that stages and advances are provided in Promulgation; slight and infirm at first, they are little by little enlarged and strengthened in the case of men endowed with good natural parts which have been furthered by diligent habits and the pursuit of sound learning; for such men make most happy progress in the knowledge of Natural Laws and in acquiring a solid and sure perception and observance of them. For just as Vice is potent in the overthrow and destruction of Principle (*Nic. Eth.* vi, 5, § 16), so Wisdom makes it easy to discern Truth in conduct, and Virtue's training of the Appetite is such that it does its will without reluctance and the Practical Intellect conforms to Natural Laws. For if Vice and all that conduces thereto—such as bad natural parts, neglect of discipline, a life prone to continual excitements and, more than all, ruined by pleasures—corrupt and pervert and extinguish the judgment of the mind, so that it can not tell honorable from base or just from unjust, and so that it refuses to do homage to the Natural Laws which are the principles of conduct, it is certain that Prudence and Virtue and all that conduces to them will produce contrary results.

LXXVII. Furthermore, the judgment of the Practical Intellect can be fortified by other arguments, and Right Reason itself testifies to its own Rightness. In order to show this more clearly, it must be premised that all the Laws of Nature are either Principles or Conclusions: when Principles, they are either, on the one hand, Primary and Immediate or, on the other, Mediate; and when Conclusions, they are either closely or remotely connected with Primary Principles (Guil. Grotius, *De principiis juriis naturalis,* ch. 2, n. 7). I will give two illustrations of the importance of this distinction. Aristotle (*Nic. Eth.* iii, 5, § 19) and the Jurists (see the whole of the Titles in *Dig.* 22, 6, and *Cod.* 1, 18, on *Ignorance of Law and Fact*) lay it down that ignorance of Natural Law, which they also style Universal Law, is no excuse; but this does not apply so rigidly in cases of ignorance of conclusions of Natural Law which are remote from their underlying principles, because here every one is a more easy victim of hallucination, owing to the few opportunities afforded for the instructions of Prudence and Knowledge. To hold otherwise would be to require from everybody without distinction a consummate Prudence, a thing unattainable, ἐκ τῶν ἀδυνάτων, and to maintain as a necessary proposition that everybody can easily develop the conclusions which flow from the corresponding principles. Such an opinion would indeed argue great ignorance, ἀπαιδευσία, of human nature. I have further remarks on this topic in my treatise *De principiis actionum moralium* (disp. 2, th. 36, onwards); they may well be put side by side with

what is said here. My second illustration is the following: After Grotius has admitted the lawfulness of war against violators of the Law of Nature (a doctrine which we will not here discuss but will leave in a neutral position), he passes on to distinguish between those parts of the Law of Nature which are, and those parts which are not, evident; and he declares that, when it is an evident part which is infringed, the right of penal war arises, but not when it is a non-evident part. (See his *De jure belli ac pacis,* bk. 2, ch. 20, sec. 47 and the immediately preceding sections.)

LXXVIII. Elsewhere I have shown at some length that a knowledge of morals is given us to render the mind unchangeable, *ἀμετάπτωτος*, and to give it full assurance with regard to its own demonstrations; and in the same way there will be no less assurance with regard to the promulgation of Natural Law, but rather the fullest assurance, such as utterly compels the mind's assent (Mevius, *Prodromum,* insp. 2, n. 26). Now in every branch of Science three things are needed: a Subject concerning which something is shown; an Attribute (*adfectio*), or that which is shown with regard to the Subject; and a Principle which is shown to be the cause whereby the Attribute exists or inheres in the Subject: and these three can be found in the Science of Natural Law, which is sometimes styled Moral Philosophy. For the Subject is human moral conduct, the Attributes of which are shown to be that it is either Just or Unjust, Honest or not Honest; and this is by reference to Principles which themselves are Laws of Nature, principles of living and principles which demonstrate the conduct wherein moral living consists. (Aristotle, *Rhetoric* iii, ch. 17.) And although the same Philosopher, in his *Analytics,* requires that the principles of demonstration shall be Immediate, yet this is to be understood as applying only to demonstrations of the prime and principal order, from which we advance in due sequence, and according to the rules of analysis, in such a manner that the conclusion of the first and immediate demonstration becomes the principle of the next succeeding one, and so on until the series and chain of demonstrations reaches its close in some particular conclusion. Accordingly, Aristotle (*Nic. Eth.* vi, 11) shows that the Intellect, alike Practical and Speculative, deals with ultimates of two varieties, or with ultimates at both ends, *τῶν ἐσχάτων ἐπ' ἀμφότερα* (§ 11); and as the virtue of the Practical Intellect is Prudence, and as this is directed to the ultimates at both ends, *τῶν ἐσχάτων ἐπ' ἀμφότερα*, this means that on the upper side it ends in some primary and intuitive principle, and on the lower side in some particular (action or conclusion). For the Philosopher shows (*Nic. Eth.* i, 4) that the Intellect employs both paths, and he illustrates this by the double running-track, *διαύλος*, concerning which consult Pollux's *Onomasticon.*

LXXIX. You say that it falls to few to learn about the Laws of Nature by clear demonstrations, inasmuch as only a few render homage and assent to those Practical Principles. Nay, verily, those principles will command the assent of all who have accepted and employed those guiding supports of Prudence and Virtue which I mentioned above; that is to say, all whose natural parts are not distorted, but are capable of discipline, and who have been well trained and are habituated to good works. "For the good man forms a true judgment on individual things, and whatever truth there is in any of them shines out for him at once. For his habit of mind is such that he devises things honorable and pleasing. And herein it is, perhaps, that the good man so far excels others, namely, that he sees the truth in things as if he were their standard and measure." (*Nic. Eth.* iii, 4, § 10, onwards.) Accordingly, even if you prove that bad men are in the majority and that all of them think otherwise of practical principles or Natural Laws than good men do, yet their judgment, being corrupted by vices and pleasures, is not to be compared with—much less be preferred to—that of good men. For, just as wholesome things are wholesome to sound constitutions but diseased and sickly bodies are better suited with other things, whether bitter or sweet or hot, so also good men form correct estimates of what things are honest and what not honest, adjudging that the former are to be done and the latter to be avoided, whereas bad men are led by the weakness of their mind, ἀρρωστία, to a contrary conclusion. In the same way, although Natural Laws are in themselves certain, yet relatively to men and human knowledge they may be either obscure or uncertain or clear; so that, just as jurists employ as a kind of standard of human conduct the diligence of a good man, so, and rightly, philosophers refer to the judgment of a good man, whose nobility of character, καλοκἀγαθία, is known to be conjoined with Wisdom in an indissoluble connection, and who therefore knows better than any one else whether a given action is or is not conformable to the Natural Laws which Prudence has promulgated.

LXXX. But, you say, how is it that these Practical Principles or Natural Laws are not as potent to convince the Intellect as are the Speculative Principles, which compel the assent of the bad no less than the assent of the good? Well, there is a great difference between the Speculative and the Practical Principles, just as there is between Speculative and Practical Truth (*Nic. Eth.* vi, 2). For, Practical Truth not being consummated by speculation on the Truth but being, like the Practical Principles, expressed in action, it follows that the Practical Intellect of one who proposes to carry Practical Truth into action must be otherwise ordered than the Speculative Intellect which ends in a state of mere contemplation. The latter can yield its assent to principles which are purely Speculative, whether the man's mind be of a good or

of a bad moral cast; while, contrariwise, he alone whose mind is well trained and well prepared for good actions can yield assent to Practical Principles. I have written elsewhere about Practical Truth (see my *Examen probabilitatis Jesuiticæ,* ch. 9, reg. 9).

LXXXI. Demonstrations are not, however, the only criteria which the Practical Intellect utilizes in the promulgation of Natural Law and in the confirmation of its truth and authority. There is another criterion by means of which the truth of things is ascertained, κριτήριον, ᾧ ἡ ἀλήθεια τῶν πραγμάτων γιγνώσκεται, to employ the identical remark which is made about Dialectics in the *Zeno* of Diogenes Laërtius. The criteria to which I refer are Experience and Conscience. Accordingly Eustratius supplements Aristotle's statement that Principles can be ascertained through Induction or Perception or Habituation, by adding Experience, though maybe this does not differ from Induction (*Nic.Eth.* i, 7, § 56). The manner in which Experience is generated is neatly described by the Philosopher (*Posterior Analytics* ii, last ch.). Says he, " Animals have a certain congenital faculty of judgment, δύναμιν κριτικὴν σύμφορον, which we call Perception." And in another place (*Topica* ii) he says, " Perception is judgment, τὸ δὲ αἰσθάνεσθαι, κρίνειν ἐστί." The sentient faculty, accordingly, perceives the objects of sense and differentiates between them, but with differing effects as between brutes and man—nay, even as between brutes and brutes, for some brutes are merely susceptible to the sense-impression, τὸ αἴσθημα, which the object produces, retaining no remembrance thereof, while in the case of other brutes there remains after the sentient act a kind of image or reflection which they retain in their memory. Man, however, is not merely percipient, enfolding in his memory his sense-perceptions, but he employs the force of intelligence in comparing these images with one another and investigates the differences between them in the light of Reason. Hence comes Aristotle's generalization, in the passage already referred to, Memory is the product of Perception, and Experience is the product of many identical memories; that is to say, out of the memory of repetitions of the same thing comes Experience, which is nothing else than a mass of memories, many in number and all composed of individual matters of the same semblance. Further, out of Experience, wrought upon by Reason, there springs up in the Intellect and remains there a certain unitary Universal over and above the Manifold (in the Philosopher's language)—that is to say, a mental concept which is derived by abstraction from many, nay from all, those individuals, but actually existent as one and the same in each of them—and this thereafter is the Principle, whether Practical or Speculative, of demonstration. Side by side with this text of the Philosopher another of his may well be placed (*Metaphysics* i, ch. 1): " It seems, then, that for practical purposes Experience does not differ from Art; nay more, we see practical men more successful in their treatment

than those who possess Theory without Practice, the reason being that Experience is a knowledge of individual cases, whilst Art is a knowledge of the General Law." Hence, when the Philosopher (*Nic. Eth.* vi, 7, § 23; and 8, § 22) had distinguished Prudence into two kinds, one dealing with Universals and the other with Particulars, the latter kind differing nothing or little from Experience, he went on to say that each kind is of such excellence that he who possesses either must be deemed a person of solid Prudence; and he claimed that no less weight must be attributed to the counsels and pronouncements of the aged than to the demonstrations of the wise, inasmuch as the aged have the Eye of Experience, τῆς ἐμπειρείας ὄμμα (*Nic. Eth.* vi, 11, § 22).

LXXXII. When, then, we as members of Natural Societies observe in practice that some courses of conduct tend of themselves to the attainment and preservation of the ends of those societies, while other and contrary courses of conduct tend to disturb and subvert those ends, the Practical Intellect, under the teaching of this Experience, concludes that conduct of the former kind is to be followed after and conduct of the latter kind is to be eschewed. As, however, Experience is composed of particulars, the discipline of Experience takes the same course. Suppose, for example, that one has noticed how a contract of sale is upset and brought to naught, sometimes by the default of Titius the buyer, sometimes by the default of Sempronius the seller; at one time by the mistake of Caius, and at another by the mistake of Mævius; and how there arises hereout a great unfairness, and out of the unfairness arise murmurings, and out of the murmurings quarrels, and out of quarrels the break-up of societies; and how in this way want is brought about: why, then the Practical Intellect abstracts these experiences from the particular cases in which they occur, and, basing a Universal Principle thereon, it generalizes as follows: Whatever is a cause of unfairness or of quarrels, or of anything that hinders or nullifies the contract, with the result that demand can not be met by supply, must be kept away from the contract of sale. Such things are Fraud and Mistake; they must not approach the contract. Further, when Experience perceives that the contract of sale is not the only one whereby human wants are met, and at the same time finds as a matter of practice that Fraud and Mistake impair and disturb and lead to the infringement of all contracts alike, the Practical Intellect extends the application of that general principle to all other contracts, and concludes that Fraud must not enter into any contract and that every contract must be established and guarded by a requisite of the very contrary character, Good Faith. And when Experience has grasped the further fact, that some contracts render a greater service in the supply of needs than others, but that this end can not be attained unless in them Good Faith in the performance of the things which are due under them be more abundantly displayed than

in other contracts, and a correspondingly ampler measure be employed in the securing of fairness, on this the Practical Intellect founds the generalization that not all contracts are to be weighed in the same scales or balance, but that each must be tested on its own merits by the steelyard of Fairness. In exactly or in very nearly the same way, Right Reason works in the discovery of other matters by means of Experience, and by the process of abstraction from Particulars creates Universals which have the authority of Principles for the purpose of demonstrations and prescribe general rules of conduct for individual actions. As to what I have said about Mistake in matters of Contract, I hope it will be taken in a proper spirit and without cavil, for I am well aware of the other views which are commonly held. (See *Dig.* 18, 1 : 9 and 14; and 19, 1, 21, 2; and 18, 1 : 62 (1) and 11 (1); and Cujas, bk. 2, obs. 4.)

LXXXIII. Now the Experience of these matters is for the most part not difficult to obtain, for there is no corner of life which is outside the duties and practices of Natural Law; and those persons especially will not find it difficult who have brought to the learning and observance of the Laws of Nature those necessary equipments, a Good Disposition, *εὐφυΐα,* and Training, so that they are refined by Teaching and a fit Upbringing. Very many, too, have by Experience learned the same precepts of Natural Law and the authority thereof, and have admitted them and yielded assent to them; for their Practical Intellect and their Appetite alike were well-disposed by a Good Disposition, *εὐφυΐα,* to recognition of that Law, the former being polished by Teaching and the latter well trained by Habituation. Hence springs that consensus of good and wise persons in the ascertainment of Natural Laws, a consensus to which the best judges in these matters attach, and rightly so, the utmost importance, as appears from the considerations advanced by us a little while ago, to which may be added what at greater length I have maintained in my *Prolegomena* to Cicero's *Offices* and in my *Examen probabilitatis Jesuiticæ* (ch. 8, p. 43, onwards). I will content myself with invoking just this one testimony of Cicero's, "When all people are of one mind about a matter, it must be reckoned as a Law of Nature" (*Tusculan Questions,* bk. 1).

LXXXIV. They, therefore, who in the manner described have generalized a manifold experience from the particular actions, *τὰ πρακτά,* and upon the principles thus fashioned have reasoned rightly about practical matters—their reason was Right Reason and its activity, or *Διάνοια,* took a due course from Particulars to Universals and then from Universals back to Particulars. Where, then, the greatest respect is paid to Right Reason, Natural Laws themselves are called the dictates of Right Reason; yet we ought not to base any quibble on the fact that each sect of philosophers will assert that its own is Right Reason and none of them will willingly admit that he is or has been a raving reasoner.

For if you look at the number of different opinions and schools into which they have split off, it is too apparent that they have not all employed Right Reason; and when you come across the tenets of Atheists, Stoics, Epicureans, Cynics and others, the first question to be asked is whether their pronouncements and rulings are the dictates of Right Reason; and your answer will be in the affirmative if you find that they are in harmony, or at any rate not out of harmony, with the Natural Laws which cement and conserve Natural Societies; for when they are out of harmony therewith, the dictate is not one of Right Reason but of corrupt and depraved Reason, " for Right Reason in such matters is Prudence itself," ὀρθὸς γὰρ λόγος περὶ τοιούτων ἡ φρόνησίς ἐστι (*Nic. Eth.* vi, last ch., § 21).

LXXXV. Accordingly, even if Diagoras, Theodorus, and others deny the existence of God, it is patent at once to every one that this denial is not a dictate of Right Reason, even assuming it to possess any kind of rightness; for with what bond can Societies be held together or man be bound to man, if you abolish the Supreme Author and Source of Law and obligations? " We infer the existence of the gods from this fact, among others, that the idea is implanted in every one's mind, there being nowhere a people so utterly outside laws and morals as not to believe that gods exist." So says Seneca (*Letters* 117).

LXXXVI. If next we enter the garden of Epicurus and hear his teaching that God gives no heed to human affairs, and such-like utter spurning of God's most holy Providence, it is easily seen that this, too, is no dictate of Right Reason; for if the test, κριτήριον, of Experience be applied, it will be perceived that all things, man most of all, are directed each to its own end by Providence, and when man strives to attain his end, not by random behavior but by behavior which is honest and conformable to the Law of Nature, God smiles on him, but in the contrary case His countenance lowers. Remove God's care for human matters and you take away from God His goodness and justice; for there is naught more consistent with His nature than to return good for good and bad for bad. " To abolish Providence is to deny the existence of God: he who confesses God, at the same time admits the existence of Providence. The one simply can not be or be imagined without the other." (Lactantius, *De ira Dei,* ch. 9.)

LXXXVII. Then if the same kind of examination be applied to the doctrine which the Stoics so sternly assert and champion, namely, that there is a Providence, but a Providence that impels and moves all with fated and inevitable Necessity, you find all freedom and opportunity of moral action is destroyed thereby. Apply the test of Experience, and the admission of such a fated Necessity is seen to make all laws and punishments and rewards quite purposeless. What laughing-stocks Ulpian and the other Stoic jurists make of themselves in spending

all their wit and industry and time on the interpretation of the perpetual Edict and the explanation of so many Natural Laws, when all the time adopting that palmary dogma of the Stoics that everything moves by a fated Necessity! Experience and Right Reason, then, condemn this dogma for its absurdity, and so the Stoics will not win assent to it from any truly good and wise man. (See the admirable criticism of this Stoic dogma by Alexander of Aphrodisium, in his book *De fato.*)

LXXXVIII. There were also those who held the Immortality of the Soul to be a mere invention, and there are some such even to-day. Adopt, however, the test of Experience, and what you perceive is that many evil-doers, especially the subverters of civil authority and power, have done their misdeeds here with impunity, and despite their utter wickedness have suffered no meet punishment in this life, and yet that there is a supreme Law of the Divine Providence and Justice whereby every one shall be rewarded or punished according as his conduct has deserved; Right Reason, accordingly, can not come to any other conclusion than that the soul, when freed from the body, continues to exist. No one, therefore, will be disturbed by the authority of Aristotle when he lays it down (*Nic. Eth.* iii, 6, § 14), "Of all things none is more horrible than death; for it is the end of all things and naught remains after death, neither good nor bad"; for not only are those wiser who have been trained by Experience and Right Reason, but even whole peoples have held the true and right view of the soul, namely, that it is immortal. "Some things are known by nature; for instance, among most people the Immortality of the Soul, and our God among all people" (Tertullian, *De resurrectione carnis*). Add what Grotius has gathered together for the proof hereof in his *De veritate religionis Christianæ,* and what others have written in their special commentaries on this argument.

LXXXIX. Yet you may frequently find even the wisest philosophers challenging this testimony of Experience. One such example we will take from Seneca, *De beneficiis,* bk. iv, ch. 18, where he is showing that what we usually call Ingratitude is quite contrary to the Law of Nature, and that Gratitude is insisted on by that Law. His words are:

"It being admitted that the rendering of Gratitude is a thing desirable in itself, Ingratitude is in itself a thing to be shunned, there being nothing so disruptive and destructive of the concord of the human race as this vice. For how otherwise can we attain security but by the help of mutual services? By this one thing, the interchange of benefits, life is the better equipped and fortified against sudden emergencies. Take us one by one, and what are we? The prey and victims of animals; and our blood is the cheapest and most easily obtainable, for other animals have adequate strength for their own protection. Whatever is born to rove and to live a solitary life is armed, but man puts on weakness like a garment, being no object of terror to others by the strength

either of talons or of teeth. Two gifts he has received which have made him, though so abject before other animals, yet most strong, namely, Reason and Society; and in this way man, who in units is a match for none, becomes supreme over all. Society has given him dominion over all animals. Society has extended a sway which was born on land into a sway of an utterly different kind, and has bidden him lord it even on the sea. It is Society that has warded off the attacks of disease, has provided resources for old age, has given solace in trouble and has made us strong in that we may summon it to our aid against Fortune. Take it away, and you sever the unity of the human race, by which its life is sustained. Now it is so taken away if you cause Ingratitude to be treated with anything but loathing."

This fits in excellently with what I said a little while ago, and it will be possible in the case of other vices to draw a similar argument from Experience, and to show that, just as Ingratitude is fatal to these Natural Societies, so the other vices also ought to be shunned as being in themselves contrary to Natural Law, while the virtues and their corresponding duties are in themselves desirable as bonds and safeguards of Societies.

XC. Let us now see what the force is of the other criterion, Conscience, to whose tribunal the Apostle himself summons us. His words are: "For when Gentiles which have no law do by nature the things of the law, these, having no law, are a law unto themselves, in that they show the work of the law written in their hearts, their conscience bearing witness therewith and their thoughts one with another accusing . . . them, in the day when God shall judge the secrets of men." Chrysostom spoke as follows to the people of Antioch (*Orat.* 12): "In the beginning, when God made man, he endowed him with Natural Law. Now, what is Natural Law? Conscience has unfolded it to us and has in itself revealed the knowledge alike of things that are honest and of things that are not." The teaching of the Casuists and doctors of Moral Theology about Conscience is very far removed from the teaching of Aristotle and others of the ancients. What the teaching of the former is I have elsewhere indicated, and have examined and refuted it. They erect Conscience into a prime cause of moral actions; but I think that Conscience, properly so called, follows on moral actions. Conscience, in my thinking, then, is good or bad according as it follows on good or bad actions; so that one kind of Conscience is rightly called good and another bad. Each kind admits of inclusion in the following general definition, namely, that Conscience is a judgment of the Practical Intellect, whereby good or bad conduct is examined, and joy and tranquillity are brought in the former case and trouble and confusion in the latter case.

XCI. Some dispute whether Conscience is an act or a power or, indeed, an attitude of mind. This is a question of little or no relevance here, but it may be pointed out that many hold Conscience to be an act of Synteresis (Cœlius Rhodiginus, *Lectiones antiquæ,* bk. 2, ch. 26). Now Damascenus defines Synteresis as a mental attitude concerning morals put within our competence by Nature, or a mental attitude implanted in us by Nature towards the principles of morals, which waits on and preserves the Laws of Nature, urging man on towards the good and calling him away from the bad (Piccolomini, *Philosophiæ moralis gradus,* grad. 2, ch. 2). Aristotle also postulates a mental attitude towards principles, which he calls Νοῦς, or Understanding (*Nic. Eth.* vi, 6); but to that mental attitude he refers the knowledge of Speculative Principles no less than of Practical Principles, whereas we have shown above that no attitudes of mind are innate in us. There is, then, no point in inventing new words and new attitudes of mind, so long as it is agreed that the Practical Understanding does possess the force in question.

XCII. All the ancients discourse about both kinds of Conscience in the same sense, but it would be a long business to write out their words and, were they collected here, a tedious business, maybe, to read them. The fable of the poets about the Furies is well-known, and how they signify thereby the genuine tortures and terrors of a bad Conscience, which is the interpretation given to it long ago by Cicero, in his *Pro Sexto Roscio:* "Don't imagine, as you often see in fables, that the perpetrators of impiety and crime are really driven to and fro in terror by the burning torches of the Furies. It is every man's own misdeed and self-made terror that chastens him; his own evil contrivings and the Conscience that is in his own mind cause his fears. These are the Furies which are ever in session in the wicked man's own home." I refrain from adding similar testimony from other authors. The Christian Fathers, likening, with Holy Scripture, Conscience to a worm, enquire whether the torture of this worm rends and gnaws the soul with keener pain than the burning of fire, and they conclude that severer pain is felt in the former than in the latter case. For the explanation of this opinion, see in Cœlius Rhodiginus (*Lectiones antiquæ,* bk. 10, ch. 14). As, however, no pagan writer has set out a correcter view concerning the force of each kind of Conscience than Aristotle has done, I can not pass his words over. Now, after he had shown the great difference between Good men and Bad men, and between the Friendship of the Good and the Friendship of the Bad—the Good man behaving towards his friend as he does towards himself, while the Bad man can not come to proper terms with himself and much less with his friends—Aristotle goes on to say (*Nic. Eth.* ix, 4, § 27, onwards):

"Utterly bad and impious persons are always at variance with themselves and, while desiring one set of things, wish for something else,

just like incontinent people. For these spurn and reject what they believe to be good for themselves, and pursue what is pleasant and take what is hurtful. Others are so cowardly and lazy that they utterly abstain from doing what they know to be best for themselves; and there are people whose moral depravity has led them to commit many terrible crimes, and they hate and shun life and try to put an end to themselves. Vicious people seek companions to spend their days with, and try to escape from themselves; for, when they are alone, there are many serious and disagreeable things which they recall and others which they anticipate, but when they are in the company of other people they forget these things. There is nothing lovable in them, and therefore they have no feeling of love for themselves. Nor do such people sympathize with themselves in joy or sorrow; for their soul is divided against itself, one part * being pained—so vicious it is—at abstaining from certain actions, and the other part being pleased thereat. One part of the man pulls this way and another part pulls that way, as if they would pluck and tear him asunder. Or if it is impossible to feel pain and pleasure simultaneously, it is not long, at all events, before the vicious man is pained at having been pleased and could wish that he had not enjoyed such pleasures. It follows that if this condition is a condition of extreme misery, we must strain every nerve to avoid wickedness and must make it the ambition of each one of us to be virtuous."

And the same Philosopher (*Nic. Eth.* ix, 8, § 33, onwards) teaches as follows: "The bad man does not love himself. For he harms both himself and his neighbors by his indulgence in evil practices. Truly, the things which a bad man does are very much out of accord with the things which ought to be done." Nor was the force of this Conscience unknown to the jurists of old, as may be seen in *Dig.* 40, 9, 15, pr.; and 48, 21, 3.

XCIII. Aristotle also (*Nic. Eth.* ix, 8) gives us a masterly picture of the working of Good Conscience in those who, by reason of their Virtue, are self-lovers, φίλαυτοι; and after describing in full the characteristics of this self-love, φιλαυτία, he concludes (§ 32) as follows: "Every good man should be a self-lover." And he says (*Nic. Eth.* ix, 4, § 18): "Such a person wishes to dwell and live with himself, for it is pleasant for him to do so, his memories of the past being agreeable to him; so also his good hope of the future—it, too, is agreeable to him. His mind, moreover, is stored full of things that he has perceived and thought about, and he sympathizes with himself preëminently in pain and in pleasure. For the same things are pleasant or painful to him always, and they do not vary; and I might almost say that he does nothing that he regrets," etc. I will add one testimony to the Good Con-

* Here (and elsewhere) I have followed the original text of Aristotle rather than the translation given by Rachel. The deviation here is very slight; without it, however, I could not make the sentence beginning "Or if" intelligible.—TRANSLATOR.

science which is afforded by Seneca. " The mind," says he (*Epistle* 59), " of the wise man who is conscious of no evil in himself is like the condition of the universe beyond the moon. It is always serene up there; and a wise man is never without joy, a joy which can arise only from the consciousness of his virtues." It would, I think, be a misuse of time to confirm this by examples and to give illustrations of the working of each kind of Conscience; they are in readiness and accessible to any one who turns over the records of history. Some few of them, however, I shall proceed to touch on.

XCIV. It will be of greater service to the development of my theme if I show the origin of that force of Conscience which procures, for the good, tranquillity of soul and a preëminent joy, these being no small portions of human happiness; but on the other hand harasses and terrifies and tortures the bad, and keeps them ever on the rack. I have said that the enquiry made by Conscience, and the accusation, evidence, and acquittal or condemnation, are acts of the Practical Understanding. Now this power is given to us by Nature, that is, by Divine Providence; and, like every other natural faculty and power, it is granted us with some definite employment and function in view, for Nature does nothing purposelessly. As, then, Divine Providence has endowed men with a Practical Understanding for the purpose alike of grasping and learning Natural Laws, and of duly reasoning about them, so also it can not but be gathered that those judicial operations of the Understanding, whereby our conduct is searched and tested and pronounced on, are forwarded by the counsels and decrees of Divine Providence. Hence Conscience is nothing else than a ray of Divine Providence whereby the minds of the good are illuminated and incited and refreshed, in the same way that other created things are cherished and nourished and gladdened by the light of the sun. But on the wicked that same ray acts in a different way and with a different effect, burning, terrifying and tormenting them, so that their mind tosses about with manifold disquietude, finding no tranquillity or solace or alleviation, but is a prey to anxieties and fears and tortures. For the operations of Divine Providence vary with the varying character of the object, so that what the good feel as the flame and energy of the Divine Goodness is felt by the bad (who are said by the Apostle to be on that account self-condemned, αὐτοκατάκριτοι) as the flame and energy of God's avenging Justice. " So Nature herself often takes up arms against the violators of Nature " (Plato, *Laws* 4).

XCV. The commands and dictates of this monitor and witness and judge are respected by the good as the decrees of Divine Providence, for they flee from evil and conform their conduct to Natural Laws, thus reaping comfort and joy; but the bad are stricken with fear and trembling by what they perceive from that quarter, " their conscience bearing witness therewith and their thoughts one with another accusing . . .

them," συμμαρτυρούσης αὐτῶν τῆς συνειδήσεως, καὶ μεταξὺ ἀλλήλων τῶν λογισμῶν κατηγορούντων, as the Apostle Paul says (*Romans*, ch. 2). And it may be remarked in passing that the word λογισμῶν does not here mean mere thoughts, as it generally does. "The unclean mind is displeasing alike to gods and to men, and can not find rest either in watchings or in repose; so does Conscience stir up and ravage the soul" (Sallust, *De bello Catilinario*). This terrible force of Conscience harasses those especially who have made an intemperate misuse of power in order to do wrongs. Let us take, as an example of this, Tiberius, of whom Tacitus says (*Annals*, bk. 6):

"The beginning of the Emperor's letter seemed very striking. It opened thus: 'May all the gods and goddesses destroy me more miserably than I feel myself to be daily perishing, if I know at this moment what to write to you, Senators; how to write it; or what, in short, not to write.' So completely had his crimes and infamies recoiled as a penalty on himself. With profound meaning was it often affirmed by the greatest teacher of philosophy that, could the minds of tyrants be laid bare, there would be seen gashes and wounds; for, as the body is lacerated by scourging, so is the spirit by brutality, by lust, and by evil thoughts. Assuredly, Tiberius was not saved by his high position or by his solitude from having to confess the anguish of his heart and this self-inflicted punishment."

Nero, too, who would not yield to Tiberius in desperate wickedness—nay, who strove to outdo him—after his mother Agrippina had been killed by Anicetus, could not, either at the time or ever thereafter, endure his knowledge of the crime, although it was adopted with plaudits by the soldiery and Senate and populace; for he repeatedly confessed that he was perturbed by the vision of his mother, and by the whips and burning torches of the Furies (Xiphilin, quoting from Dion Cassius' *Life of Nero*, towards end of bk. 61). Why did nocturnal horrors so often break the slumbers of King Charles IX of France? and why had singing boys to be introduced in order to quiet him? The cause was that fatal butchery in Paris and the Guilty Conscience which came therefrom; so we are told by Thuanus, the chief historian of this period (bk. 57, p. 67, my copy): "Nothing (therefore) is more wretched than a man's Guilty Conscience." And this test, κριτήριον, is not defective even if at times it may suspend its operations and, like a flame that is lurking in ashes, display its energy somewhat tardily. For who was ever stricken with the terrors of a Bad Conscience unless he thought himself in the grip of an accusation of heinous crime? And if you put forward as an objection the cases of men not wholly bad who have suffered grievous tortures of Conscience, it can in the first place be replied that it is a human characteristic to form the highest opinions of any given person; and all the time it is certain that some are pricked in Conscience by hidden

sins who otherwise pass as good men, while deeply penitent for wrongs committed by them—nay, though they be really good men who are thus distressed, their distress is at any rate due to their belief that they have done wrong. On the other hand, a Good Conscience furnishes the most comfortable testimony, so that its possessor is assured of the Divine favor and has naught to fear, but is triumphantly happy in his enjoyment of security and tranquillity of soul, so that beyond doubt, " were the whole globe to be shattered to pieces, the ruins would strike him undismayed."

XCVI. This being so, some arrange punishments in four degrees, of which the first is contained in the Vice and Sin itself. " The first and severest punishment of the sinner is that he has sinned; accordingly, no crime goes unpunished, for crime is its own punishment, and no worse hurt can be imagined than that which is solely derived from the offense" (Seneca, *Epistles* 93). The second degree of Punishment is found in Conscience, the force of which we have discussed. This, I think, is the meaning of what Socrates says in Xenophon's *Memorabilia*, bk. 4: " That the laws contain in themselves the punishment of those who break them seems to me the work of a more excellent Lawmaker than any mere man could ever be." For the outflowing of this Divine energy in the minds of men argues a common source, which can be no other than the Law or Justice common to all men. The third degree of Punishment consists in the fear of Punishment, about which Seneca makes another good remark (*Epistles* 98): " Fortune exempts many from punishment, but none from fear." And Plato, following Euripides, said rightly, " Fear is an ever-active tormentor of the bad man's mind." The fourth degree of Punishment comprises the penalties which are prescribed for wrong-doers and which involve physical suffering and often a loss of civil status (Piccolomini, *Philosophiæ moralis gradus* 9, ch. 53). Further, as pointed out a little while ago, no one must deem the test of Conscience a doubtful or deceptive one on the ground that some of the worst men, men who are stained with the foulest crimes, either are insensible to the punishment of Conscience or only feel it tardily. To adopt such an attitude would be to peer into the secret counsels and decrees of God and impiously to try to measure His wisdom and justice with our ten-foot rod. Not shameless prying, but wonder or, rather, veneration is our becoming posture towards His decrees. For even the pagans admitted how marvellous He is in the award of punishments, Pindar addressing Him on that account as Supreme Artist (*Aristotechna*). And although God's vengeance moves at times with slow steps—so that the old adage spoke of the gods as having wool-shod feet—yet this must be credited to His unbounded goodness when He allows man an interval in which to come to his senses, or else be attrib-

uted to His unfathomed wisdom when He balances the tardiness of the penalty by its severity. Meanwhile the poet's lines hold true:

> Raro antecedentem scelestum
> Deseruit pede pœna claudo.
>
> (Seldom does punishment, though lame of foot, quit the criminal who goes before.)

Nor is it less sure that all sin deserves punishment, although the administration thereof be sometimes postponed by God for years or even for a whole life, since the soul's immortality puts complete impunity outside contemplation. (See what Cœlius Rhodiginus says when discussing this point, *Lectiones antiquæ,* bk. vi, ch. 14, "*On the Reason of Tardiness in the Punishments of Divine Providence.*") Because, then, Conscience furnishes so unmistakable a test with regard to the promulgation and, as the case may be, to the violation of Natural Law, Nicolaus Hemming formulated the following definition: "The Law of Nature is the sure knowledge, divinely impressed on the mind of man, of the principles of thought and action and of the conclusions, adapted to the proper end of man, flowing from those principles, which conclusions are developed by Reason out of those principles as necessary consequences for the government of human life, so that man may perceive and will and elect and perform what is right, and may avoid the contrary, Conscience being divinely appointed to man as witness and judge in all these matters." (Add Guil. Grotius, *De principiis juris naturalis,* ch. 1, n. 9, and ch. 4, n. 3, onwards, where he, too, recognizes these tests of Natural Law, without, however, explaining them individually with equal clearness.)

XCVII. I have said that the promulgation of Natural Laws does not take place in one manner and order; and the cause thereof I have shown to be that men have not all received from Nature identical inclinations and dispositions, nor enjoyed identical training and instruction, nor followed the same moral courses. Now, so far as this promulgation is completed or aided by Teaching, it takes place in two ways; namely, by means of Prudence or by means of Knowledge. Prudence supplies its dictates according as, at different times in human life, now one and now another of the Natural Laws call for their expression in human conduct and for the adjustment of human conduct to them. Knowledge, on the other hand, adopts a sure method and makes use of principles which it treats as authentic causes, deducing practical demonstrations therefrom. For the true teacher will found his teaching on a knowledge of causes, which he will obtain from authentic and proper principles of proof: "all teaching and ratiocinative process are based on prior perception" (*Posterior Analytics* i, ch. 1). Now, To know is to learn a thing through its cause, perceiving why the particular cause leads and must in-

evitably lead to the particular conclusion (*Posterior Analytics* ii, ch. 2). And, as To know is to learn something through a demonstration, there are numerous individual or particular practical sciences, all of which some thinkers have tried, with varying degrees of success, to compact into a single system and one undivided whole of learning; but they employed such diverse methods that, more often than not, they hawked conjectures and empty opinions about for true practical Science. Now Aristotle rightly held that there was nothing to prevent a man from knowing a proved matter in part and being ignorant of the other part (*Posterior Analytics* i, ch. 1, at end); for not everybody sees right through the force of a demonstration or the inevitableness of a conclusion deduced from premises, and so not everybody attains to the truth of a demonstration and yields assent to it ἀμετακινήτως, unshakably. Where, however, a man gives a premature assent even to a true demonstration, so that he has no perception of the underlying cause whereby the particular conclusion not only is reached but could not but be reached, he gets hold of knowledge by accident, κατὰ συμβεβηκός, as the Philosopher shrewdly says (*Posterior Analytics* ii, ch. 2, pr.). Seeing, then, that not every one is capable of penetrating the force of a demonstration, and that the appropriate method of teaching may not have been resorted to in the transmission of the knowledge of Natural Law, it will be clear to every one how it comes about that a man's knowledge of the Laws of Nature may be partial only or may be accidentally acquired.

XCVIII. We accordingly will next consider the systems which some have employed in transmitting the learning of Natural Law, but without any attempt to hide our own opinion. The jurists give pre-eminent commendation to the precepts of Law (*Jus*) Live honestly, Injure no one, Give every one his due (*Inst.* i, 1, 3). But if we want the truth, every rule (*Lex*) is a precept of Law (*Jus*); for it announces a definite legal proposition, into accordance with which human actions are to be shaped. This the jurists would certainly not have called in question. Various explanations are, indeed, given by commentators why Ulpian made conspicuous mention of the three rules named, but which of these explanations the jurist had in mind at the time he wrote, is beyond the guess of a soothsayer. I have always thought that the most reasonable explanation—and I find that Felden anticipated me in accepting it—is that by the first precept, Live honestly, Ulpian meant to include every duty which Universal Justice exacts; by the second precept he meant a duty of Particular Contractual (συναλλακτική) Justice, to hurt no one whether his rights spring from voluntary or from non-voluntary agreement; and by the third, a duty of Distributive Justice. The deficiences of this enumeration will appear from subsequent statements of our point of view. (See Guil. Grotius, *De principiis juris naturalis,* where he examines these three precepts at some

length.) It is notorious what odd bits have been sewn together in order to make the Pandects, so that any systematic explanation of that little bit taken from Ulpian can not be demanded. The old jurists undoubtedly display, though not everywhere alike, their admirable talents in the successful way in which they draw the conclusions of the Law of Nature, yet the sources and principles of these conclusions seem in large part to flow in hidden channels, like the fountain of Arethusa.

XCIX. Three other primary heads of Natural Law are commended by Julius Cæsar Scaliger, in the preface of *Epidorpides,* bk. 1:

Nature would have us to draw all the springs of our life
From these three dictates of Reason (that Ray from above),
With which, like food for our journeying, Nature equips us:
Worship thou God, for this is thy goal, the first and the last;
Neither squander thyself nor squander thy goods by neglect;
Do unto no one what thou wouldst not have done unto thee.
In these three rules are comprised the perfect beatitude;
Who so contemneth the same, he shall go empty away.

Now all this is fairly obvious and applicable to many kinds of conduct; but there are many other rules of life which come to us from Nature, and which it is important to recognize with clearness, but the task of reducing them under some more general principles, if that be desired, must be approached by another road, as will appear from what follows.

C. Now as some English jurists and theologians have devoted themselves more than others to the systematic analysis of Natural Law, we will turn to them. John Selden deservedly holds the first place in their ranks. Preliminary to his consideration of the Laws of Nature he displays them in seven rules. The first of these rules relates to the external worship of God; the second to cursing God's name, or Blasphemy; the third to the spilling of blood, or Homicide; the fourth to the shame of fornication; the fifth to theft and robbery; the sixth to the judge's authority in lawsuits and to civil obedience; and the seventh to abstinence from the flesh of living animals as food. In this enumeration there are many deficiencies; but they must not be imputed to Selden, because he does not profess to base this enumeration on his own judgment but on the theory of Jewish jurists, and he is not therefore placing before us the Law of Nature absolutely, but only relatively to Jewish theory, wherein the Law of Nature is called the Law of Noah's children and these seven rules are supposed to have been given to the posterity of Noah, that is, to the human race, as being rules of especial salience. In this list there are some rules which should more properly be attributed to Positive Law, and so also there are many most important rules of Natural Law which the Jews ought to have added to that list. (Guil. Grotius, *De principiis juris naturalis,* ch. 5, nn. 10 and 17; and Osiander, *Typus legis naturæ,* th. 46 and 47.)

CI. And when mentioning Selden, I at the same time call to mind the very illustrious John Christian, independent Baron of Boineburg, who—so remarkable was his bent for all kinds of studious pursuits—would from time to time lay before the learned the excellent disquisitions with which he occupied his talents. And that was how, when writing to me in his exceptionally cultured vein about many other matters, he would sometimes express his desire to follow in Selden's footsteps with a Commentary on the Law of Nature from the standpoint of Christian theory. There is extant a learned Dissertation, prefacing the *Ethics* of Johannes Cirellus (who is Crellius, the well-known Socinian), in which the difference between the Virtue of the Pagans and of the Jews and of the Christians is discussed and many examples are given to show the superiority of the Christian virtues over the Jewish, and of the Jewish over the Pagan. Now I do not believe that the wishes of our lamented Mæcenas could have been satisfied by the proof of this difference, but that what he particularly hoped for was that some one would show, by reference to the writings of the best theologians, and especially of the Fathers of the Church, what these writers believed to be institutions of Natural Law, and by what arguments they have fortified and illustrated each of the heads thereof, and how they thought them to harmonize with Christian teaching and whether they thought Christian teaching superior to Natural Law and to have many advantages over it. Now none could successfully attempt this theme, much less bring so great an undertaking to a conclusion, who had not acquired an exact knowledge of Christianity, both Natural and Revealed—that is to say, it must be left to the theologians. And chiefly because, in Christian teaching, such great emphasis is laid on the Law of Charity and on the Law of Patience, and many, including Grotius, have notoriously deduced numerous particular results therefrom, I asked, nay begged, some to devote some labor to the unfolding of these Laws and to show how far they agree with the Law of Nature and in what they excel it. So far I have had no success herein, but once again I urgently commend the matter to them, and I embody my wish in the words of the author of the much praised Dissertation mentioned:

" Would that breathing-spaces for employment in moral disquisitions might more often find their way in between the over-many and over-subtle questions which try the keen wits of the theologians! Would that, through the more careful observance of Christian Duties, a milder spirit might be infused into the countless polemical treatises which issue from both sides alike, with such a lack of restraint that the pen-points have been lengthened into swords and that, very often, even if pens and words have not been wet with blood, they have been stained with livid gall and the black venom of the cuttle-fish! In that way Faith, directed to Right Knowledge as its goal according to the Apostolic injunction,

would render Speculation and Conduct alike more accurate and less meddlesome."

Although, then, I could not procure the accomplishment of this task for the Mæcenas of Germany in his lifetime, I at any rate have sedulously and publicly commended it to others after his death; and the record of that fact I inscribe upon his grave,

ubi mollis amaracus illum
Floribus et dulci adspirans complectitur umbra.

(Where soft marjoram, breathing forth its blossoms, embraces him with sweet shade.—Virgil, *Æneid* i, 694.)

CII. Let the second place be given to Robert Sharrock, who wrote a Theory of Duty according to the Law of Nature, of which theory he furnishes the following summary. He holds that the end of man is to employ himself in tranquillity of mind and in happiness, without any goadings of Conscience. A means to this end, says he, is the careful observance of the rules and decrees of Nature which enjoin: No one is to hurt another person who is innocent; Every one should keep faith; Every one should return good to those who do good to him; Every one should seek the welfare of himself, and of his offspring, and of his kindred—the first of this last group he calls self-love, φιλαυτία—and Every one should assist even those not of his blood. And obligations solemnly entered into can not, he holds, be determined except (1) by performance, (2) by subsequent impossibility supervening, and (3) by release given by the party interested in the performance. Then, if a man has offended, he would have him study how (1) to redress the loss caused by the breach of obligation and (2) to placate the offended Deity. Further, since there is not included in these the ultimate principle of the bindingness of good faith and of the laws, these individually enumerated heads do not exhaust the teachings of Natural Law, nor are their diversities brought out with adequate definition, nor, lastly, does it appear in what way, indicated merely by the teachings of Natural Law, the offended Deity is to be placated, although the fact that He ought to be placated is of course an admitted part of that Law.

CIII. Let the third place go to Edward, Lord Herbert of Cherbury and of Castle Island in Kerry, a peer of the realm of England, who reduces the common notions of Natural Religion to the following five heads: (1) There is a Supreme Deity; (2) The Deity must be worshipped; (3) Virtue and Piety are especial parts of Divine Worship; (4) The Sinner must return from sin and expiate each sin by Repentance; (5) Rewards and punishments are given after this life. The writer in question deals with this topic, primarily, in a book *On Truth as distinguished from Revelation, whether Probable or Possible or False,* to which he has tacked on another *On the Causes of Error and the Religion of the Gentiles.* Now in these books he does away entirely

with the authority and credibility of Revelation; so we can not attach much importance to him, seeing that his scheme is to reject all Revelation and to establish Atheism, even though he appears to respect the rules of Natural Law. Nay, even this last-named attitude he can not be deemed to have adopted with an honest intention of establishing the descent of Natural Religion from the Law of Nature; but his intent is rather to cloak his own hostility by postulating the origin in question, and under the guise of defending Religion to ruin and crush it. For he can not be unaware that Natural Religion is too imperfect to be a means of obtaining salvation, and that it branches out into a number of rules the knowledge of which is just as necessary as, and not less necessary than, that of the laws promulged by Nature. And how can he prove what are the ways in which, under the Law of Nature, the offended Deity is to be placated, and whether it be by penitence alone, or such like, especially where the sinner has repeatedly relapsed? (See Osiander, *Typus legis naturæ,* th. 61, and especially the learned treatise of my very intimate friend and colleague, Doctor Christopher Franckius, *De religione naturali,* in which he has undertaken the refutation of Herbert's views.)

CIV. Next let Richard Cumberland come, a theologian whose philosophical dissertation *De legibus naturæ* was printed at London in the year 1672. His doctrine is as follows: "Benevolence is of the most far-reaching operation; it is the source, measure and rule of our duty, and our single law: nay, it is the end of our actions, the amplest reward that we strive for, and in a word the Supreme Good of man." The obligation to manifest Benevolence is the subject of the whole of the treatise *A Rational System,* which he divides into the two parts, God and Man. And after attempting to illustrate this discussion by analogies drawn from mathematics, he briefly shows that in the foregoing fundamental principle and in the negative propositions which it implies, there is contained a summary alike of all the rules of Natural Law and of the Sanctions annexed to them (in the word "Sanctions" he includes both Rewards and Punishments). The subject of the first-named treatise is Devotion, so far as our strength goes, to the Common Good of the whole system of things Rational. But in the second treatise the theme is Love towards God and Universal Man, the two parts, be it remarked, of this system. God is the principal part; Man is a subordinate part. Benevolence towards both involves Piety and Humaneness; that is to say, both tables of the Law of Nature. But the predicate of that proposition is [that Benevolence] conduces to the good of each of the parts individually, in which fact our happiness—we being one of the parts—is involved; and this happiness is the supreme reward of obedience, just as the misery which results from the contrary course of action is the supreme punishment of wickedness. Further, the natural connection

between predicate and subject is both the basis of the truth of the proposition and the proof of the natural connection between obedience and reward and between transgression and punishment. If then, says Cumberland, it be granted that there is a manifest necessity, if we want to be happy, of preserving friendship with God and with men, the sanction at once becomes apparent of that most general Law of Nature, namely, the proposition about Benevolence. For Benevolence is the sole stay of the whole of Natural Religion and of all the essentials of the happiness of the human race. These essentials, over and above Piety, are: (1) Peaceful intercourse between different peoples, which is what the rules of the Law of Nations are directed to; (2) The establishment and preservation of Civil Society, which is the aim of Civil Laws; (3) The security of domestic relationship and of all kinds of friendship. These are provided for both by general rules which strengthen the peace of the world and also by special domestic rules. These things premised, our author begs his readers to consider them not merely one by one but in conjunction with one another, so that as a whole they will furnish one convincing proof in support of the ultimate general law that man will inevitably miss his highest happiness, which consists in the proper and adequate employment of his faculties, if he does not devote those faculties to the furtherance of friendship with God and with his fellow-men, for the attainment of which result before all others they are selected by Nature, in a way which leaves no excuse to transgressors of the Law. Accordingly, it is a matter of sure prevision that the attainment of these results follows on the endeavor in question; and, says he, no one can be ignorant that they carry with them the comforts and joys of Religion in the present life and also the universal hope of a blessed Immortality; and in addition that the manifold advantages of peaceful dealings with foreigners, and all the advantages of civil and domestic order, and all the gains of Friendship, are annexed like prizes to this endeavor, and that these can not be attained by any other means in our power, and therefore that the man who rejects the care of the Common Weal rejects to the same extent the causes of his own happiness and adopts the causes of his own misery and imminent punishment. This endeavor after the Common Weal furnishes to the wise, says he, a rule by the aid of which they establish a certain moderation in conduct and affections which is the essence of Virtue; and he says that Aristotle, in his definition of Virtue, entrusted this task to the judgment of a wise man, without, however, indicating the standard to be adopted by the wise man in that judgment; and then he shows that his own general proposition must be taken by nature as the standard of the best and highest end, regard being had to all parts of the whole system of things Rational, or of that State whereof God is the head and His subjects the members. Then he shows that from this source must be derived the order prevailing among the special laws of Nature whereby a prior rule limits in a certain degree

a posterior rule, posterior rules being subordinated to prior rules, and all special rules to the one general rule—so, however, that, of a certainty, God never dispenses with any of them, but in those cases in which the obligation of a posterior obligation seems to be destroyed, there is such a change of circumstance wrought that there is only scope for the application of the prior law. I have selected a few points only for reference, employing for the purpose the words of the author's prolegomena. The substantive part of the book is arranged into chapters as follows: the first chapter is on the Nature of things, the second on Human Nature and Right Reason, the third on Natural Good, the fourth on Practical Precepts, the fifth on the Law of Nature and its Obligation, the sixth on the contents of the general Natural Law, the seventh on the origin of Property, and of the Moral Virtues, the eighth on the Moral Virtues one by one, and the ninth on certain corollaries. Beyond a doubt it is a book well worth reading and its teaching full of truth and in harmony with the end imposed on man by Nature; but as its especial purpose was the refutation of the moral and civil philosophy of Hobbes, the prime use which the author made of his ultimate general Natural Law was to oppose it to the wolf-like condition which Hobbes imagined as the natural condition of man, and he directed his proofs to that end. I find next to nothing left to desire in the treatise save a neater method and more lucidity; had these been there, the author would have earned our approval in almost every particular, for it often happens that a journey to the same end is undertaken by different routes.

CV. We will give the last place to Thomas Hobbes, for filth falls on the hindmost.* Commencing with a faulty definition of the Law of Nature, namely, that it is "The Dictate of Right Reason, conversant about those things which are to be either done or omitted, for the constant preservation of Life and Members, as much as in us lies," he goes on to arrange Natural Laws in order (*Philosophical Rudiments concerning Government and Society,* chs. 2 and 3):

I. "The first and fundamental Law of Nature is, that Peace is to be sought after where it may be found; and where not, there to provide ourselves with helps of war"; and to this he adds shortly afterwards, "One of the Natural Laws derived from this fundamental one is this, That the right of all men, to all things, ought not to be retained, but that some certain rights ought to be transferred or relinquished."

II. To perform Contracts.

III. That you suffer not him to be the worse for you, who, out of the confidence he had in you, first did you a good turn; or

* *Scabies postremum occupet* is a proverb equivalent to "Devil take the hindmost."—TRANS.

that you accept not a gift, but with a mind to endeavor that the giver shall have no just occasion to repent him of his gift.

IV. That every man render himself useful unto others.

V. Of Mercifulness: That we must forgive him who repents, and asketh pardon for what is past; having first taken caution for the time to come.

VI. That in revenge and punishment we must have our eye not at the evil past but the future good.

VII. That no man, either by deeds or by words, countenance, or laughter, do declare himself to hate or scorn another.

VIII. Forbids Pride: That men be esteemed as equal.

IX. That what Rights soever any man challenges to himself, he also grant the same as due to all the rest.

X. That every man, in dividing Right to others, show himself equal to either party.

XI. Those things which can not be divided must be used in common (if they can), and (if the quantity of the matter permit) every man as much as he lists; but if the quantity permit not, then with limitation, and proportionally to the number of the users.

XII.* Of things to be divided by lot.

XIII. Of birthright and first possession (*occupatio*).

XIV. That safety must be assured to the mediators for Peace.

XV.* The law of appointing an umpire.

XVI. That no man shall be judge or arbiter in his own cause.

XVII. That no man must be judge who propounds unto himself any hope of profit, or glory, from the victory of either part.

XVIII.* Of witnesses.

XIX. That no contract or promise must pass between him and the parties whose Judge he is appointed, by virtue whereof he may be engaged to speak in favor of either part—nay, or be obliged to judge according to equity, or to pronounce such sentence as he shall truly judge to be equal.

XX. Against Drunkenness and Gluttony and such things as hinder the use of Reason.

CVI. In these and other points very many things are left to be desired; we will touch on a few of them. In the first place, Hobbes

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* In the same expanded form as used of the others, these run in the original:

XII. What can not be divided, nor had in common: That the use of that thing be either by turns, or be adjudged to one only by lot; and that in the using of it by turns, it be also decided by lot who shall have the first use of it.

XV. That both parties disputing concerning the matter of right submit themselves unto the opinion and judgment of some third.

XVIII. That where firm and certain signs of the fact appear not, there they rule their sentence by such witnesses as seem to be indifferent to both parts.—TRANS.

imagines a certain State of Nature in which every individual is endowed with a right to everything; that is, that apart from agreement any one may do everything to everybody (ch. 1, n. 10). "In the mere State of Nature, if you want to kill, you have a right to do so conferred by that state," says he (ch. 2, n. 18). Our writer imagines a State of Nature which is condemned by Nature, and which is not so much a State of Nature as a State of the Devil: for he who proffers sound doctrine concerning the State of Nature must first consider Who is the Author of Nature; and then, when he has found out that, the state which he imagines must be such, and the ends of that state such, as are compatible with laws issuing from Such a Source. Accordingly, after tracing the Law of Nature up to Divine Providence, that Law must be made to harmonize with human nature of a rational, social and peace-loving character, and not with a corrupt, vicious and malicious nature, with instincts which make man a wolf to his fellow-man.

CVII. What drove our author to invent a state of that description? Firstly, because he made Utility the measure of Natural Law in the State of Nature; and then, secondly, because he deems that the prime law given to man is to seek his own safety before everything else: in a word, no act done in the merely natural state can be a wrong to any one. The first of these tenets is indubitably false; for, although Utility is a factor in the Law of Nature, and no small one, it is not the measure thereof, seeing that the true measure is that conformity of the human to the Divine will which arises when men obey the eternally and intrinsically good Laws of Nature. Primarily, then, Utility is the measure of Positive Law, while the measure of Natural Law is Righteousness. Next, as regards our author's second tenet: Nature does indeed bid man seek his own security, provided, however, that he does not injure others in so doing. But to erect self-preservation into the prime rule of this wolfish state, and to assert that man is not a social animal and can not in this state do anything to another that will be a wrong—all of which our self-condemned, αὐτοκατάκριτος, author heaps up here—is to mingle heaven and hell and to open loopholes for the foulest crimes. For, says he, injustice of man towards man implies human laws, which are non-existent in the State of Nature—he does indeed admit that there are Natural Laws, but not such that the breach thereof is a wrong to men, for wrong can only arise on the breach of those laws which men have laid down for themselves. Now the truth is that there are numerous Natural Laws of God's appointment for the immediate advancement of man's happiness, in such a way that the duties which thence arise are due from man to man, and if these duties be neglected or violated God is undoubtedly offended as the Author of these laws, but at the same time wrong and injury is done to man in so far as he does not receive the treatment which, under Natural Law, he is entitled to receive.

CVIII. Inasmuch as Hobbes' dreams rest on utterly false assumptions and have been already shattered and solidly refuted, especially by his own fellow-countrymen, the rest of his tenets merit no laborious discussion; nay, such fanatical dogmas ought to be banished from the company of philosophical writers—aye, from the whole world, at any rate of Christians. It is easy to see what led him to arrange his Natural Laws in the order which he adopts for them. "I have here set down," says he, "those precepts only which affect our preservation from the dangers which arise from discord." But, of a truth, what will produce a richer crop of discord—and from what can more numerous and more deadly dangers arise—than the postulate of a State of Nature wherein every one has a right against everybody else and to everything? Does not such a postulate upset Hobbes' own fundamental law, Seek peace with utmost diligence? Does it not provide most frequent, nay, perpetual, opportunities for dissensions and wars? Now the remedy which he proposes for all the ills which manifest themselves in that fictitious State of Nature, is Pacts whereby the bestial license of the times is to be checked; and so he utterly banishes from that Natural State of his the Justice which was the especial protection of the true State of Nature—and this although he nullifies the force of Pacts even, as we shall shortly see. And although most of his other rules have as their object the mitigation of that condition of savage license, yet they lack just end and basis; and, while they are, apart from the proposition which they are employed to support, entitled to be considered genuine Laws of Nature, still they do not by themselves exhaust the whole Law of Nature; nay, many parts of that Law are far more important and necessary than those which Hobbes enumerates. But as to his rule that division should be by lot, the Law of Nature neither enjoins nor forbids this, but leaves it to human discretion; and, while the institute of Birthright or Primogeniture may not be counter to Natural Law, still such binding force as it has comes from the will of man and not from Nature; and although the duty of an arbiter may find a scope in manifold matters, yet it is circumscribed by one rule of Justice, Render to every one his own.

CIX. Never, I must confess, have I lighted on any writer who has put before the world views more foolish or more foul, and I have repeatedly found myself wondering how he could earn the approval of any learned and good man; for any one with the least smattering of learning, who is not a complete stranger to practical Philosophy—and this alone it is with which we are now dealing—can see at a glance how perversely that impostor has used his talents in the propagation of Atheism and Tyranny and every kind of wickedness; and if the critic be a good man—and we desire the union of goodness with learning—he can not but detest these impious and foolish dogmas and ascribe them to perverted talents. If, then, you have a man void of learning and good-

ness, or at any rate of one of them, who is in addition inflamed with ill-considered passion for any novelty, this man experiences the first-fruits of Divine vengeance, whereby a facile assent is given even to the most pestilential falsities. Yet such examples do but establish the authority of the Divine Word; for thus says the Apostle (*2 Thessalonians* 2, vv. 11 and 12: "And for this cause God shall send them strong delusion, that they should believe a lie; that they all might be damned that believe not the truth, but had pleasure in unrighteousness," Διὰ τοῦτο πέμψει αὐτοῖς ὁ θεὸς ἐνέργειαν πλάνης, εἰς τὸ πιστεῦσαι αὐτοὺς τῷ ψεύδει: ἵνα κριθῶσι πάντες οἱ μὴ πιστεύσαντες τῇ ἀληθείᾳ, ἀλλ' εὐδοκήσαντες ἐν τῇ ἀδικίᾳ. (Add Beza's note hereon.) Now, while this novel philosophy of Hobbes has been greedily swallowed by some in France and the Netherlands, and even in Germany, many learned and good men in England have been roused by their love of Truth and Piety and Justice to take a foremost position among those who have torn the mask off this philosophy and shown its monstrous deformity, if only to prevent injury to the Commonwealth and to Moral Integrity. Some of these have assailed the whole philosophy of Hobbes, others only his civil and moral philosophy. In this latter class is Seth Ward, Professor of Astronomy in the University of Oxford, who states what he believes to be the two fundamental principles of Hobbes' philosophy of conduct, and then rends them in pieces. These principles, according to him, are: (1) That there is or has been a State which Hobbes calls the State of Nature, in which men roamed about without any legal restraints; and (2) That by means of Pacts these men united themselves into one, creating an absolute Monarchy or Empire which left them destitute of all liberty. Some, perchance, may question whether the latter is a correct statement of Hobbes' principles (the former he inculcates only too plainly and too often) and may point to inconsistent passages in other parts of Hobbes' writings; if so, I would have them carefully note how Hobbes (in the words of Seth Ward) has a way of casting a cloud over his infamous doctrines and of resorting to all manner of shifts in order to wriggle out of the contradictions without which he seems unable to exist.

CX. Now Cumberland, referred to a little while ago with approbation, who was one of the foremost assertors of the Law of Nature, trimmed his quill against "the iniquitous philosophy of Hobbes, whereon the foundations of all impiety, injustice, wrong-doing and discord are laid." By this means, says Cumberland, the followers of Hobbes are instructed in the "mysteries of Atheism." And he continues: that hypocrite has misused Holy Scripture, "the authority of which can not genuinely influence him, since he holds that it is entirely derived from the will of individual States, and so teaches that it varies with their discretion, being strong here, and null elsewhere"; his teaching "is inconsistent with itself, for it rushes into Atheism and denies

that any Divine Laws can be learned either from Nature or from Holy Writ unless a special revelation be vouchsafed to every individual, for the Sacred Writers were Prophets"; he teaches that "Civil Laws are the only rules for discerning between Good and Bad"; and "he clearly contradicts himself, for he asserts that the Laws of Nature are valid as regards external acts, yet that the Laws of Nature were not binding as regards external acts in the State of Nature." Further, he shows that Hobbes' doctrine would allow any one to commit Treason, destroy every obligation and therefore all the utility of treaties, take away security from all ambassadors and from all intercourse, subvert the bases of all rule; that Hobbes depicts the nature of Princes as fiercer and more cruel than that of wild beasts; that his doctrine of the right of every one to everything would not allow of any one entering into a Civil Society; that his opinions arm citizens for rebellion; that Hobbes' doctrine about pacts and oaths is full of danger for exalted Empires; that Hobbes deprives Princes of everything which, by way of adulation, he would seem to go beyond other philosophers in attributing to them—aye, that he accuses them of the worst crimes, for he claims that they are not bound by any laws; that he takes from Princes all praise for wisdom and justice; that Princes themselves repudiate the praise which Hobbes attributes to them, and which even Hobbes himself denies to them and that Hobbes asserts that rulers are not bound by pacts and therefore can not do any wrong to their subjects, nor to other States either. Here are some flowerets culled from Hobbes' writings by Cumberland. No one will call Cumberland's good faith in question; or if any one does hesitate to believe that such fancies could ever enter a sane man's head, let him look carefully into Hobbes and he will find that what Cumberland says is true. By way of illustration take the last-named dogma, and Hobbes shall confirm it in his own words. Says he (*Philosophical Rudiments concerning Government and Society,* ch. 13, § 7):

"The state of Commonwealths, considered in themselves, is natural, that is to say, hostile; neither if they cease from fighting, is it therefore to be called Peace, but rather a breathing-time, in which one enemy, observing the motion and countenance of the other, values his security not according to the Pacts, but the forces and counsels of his adversary. And this by natural Right . . . (*because*) contracts are invalid in the State of Nature as oft as any just fear doth intervene."

And in *Leviathan,* ch. 13 (the monstrous title bewrays a monstrous book), he says:

"Kings and Persons of Sovereign authority are in continual jealousies and . . . in a posture of War . . . To this war of every man against every man, this also is consequent, that nothing can be Unjust. The notions of . . . Justice and Injustice have there no place . . . Force and Fraud are in war the two cardinal virtues."

And in another place he shows that a justly entertained fear may discharge from a contract, saying that the party who entertains the fear that the other party will not perform what he has promised, is the judge of the justness of his own fear. These hell-begotten dogmas he not seldom besmears with fair-showing entanglements, such especially as his postulate that man is led by Nature to contrive for his own preservation and therefore to seek good and eschew evil. The utter misuse which he makes of this postulate is, however, shown by Osiander (*Typus legis naturæ,* th. 30) as follows:

" He has diabolically twisted the meaning of this so as to support his own opinions, and has perverted it to his own ends to the contentment of the father of lies. No one with a zeal for truth will ever subscribe to his doctrine or allow that Natural Law involves the curtailment of liberty to that degree, and that man's condition apart from Civil Society is simply one of war of all against all, with every one having right to everything, or that the prime origin of men's uniting together was mutual fear and the Law of Nature naught but Self-preservation. For Hobbes invents, as the root-stock of the whole race of man, men without any dependence on a common head, men without any bond of brotherhood, men fashioned into distrust by God Himself. Now who will concede to this philosopher anything so discordant with truth and right reason? "

CXI. Last year (if I mistake not) there was published in London, *Idea Theologiæ Leviathanis,* the work of John Templer, Doctor and Professor of Sacred Theology, which is prefaced by a learned discussion on the Sacred Canon, showing that Holy Scripture is the perfect rule in all matters necessary for salvation. Then a summary is given of a large number of dogmas taken from Hobbes' theology, and these are refuted by the author and commended to the reprobation of all Christians. There are also interspersed some other pronouncements of Hobbes relative to the Law of Nature, such as: " Nothing is good and bad unconditionally: As regards the honor of an action, provided it be on a big scale and difficult, and therefore a proof of great power, its justice or injustice is of little count: The natural germ of Religion consists in the fear of spirits, the ignorance of secondary causes, the worship of what we dread, and the acceptance of casual happenings as prognostications: The State of Nature is a State of War: The sum and substance of Natural Law is that every one is entitled to use all ways and means for his self-preservation; If a number of men have committed some capital crime against the sovereign power in a State, for which they expect to be put to death unless they defend themselves, they are free to join forces in their mutual defense; This doctrine, that whatever a citizen does against his conscience is Sin, is seditious; Not every private citizen is a judge of good and bad conduct; The Schools have hitherto

been of no use." This and other similar stuff Templer sets out in Hobbes' words; and then he destroys these absurd and impious dogmas with sound arguments. Whereon a song of triumph, ἐπινίκιον, is sung in his honor over the prostrate and wretched body of Hobbesism by Charles Robotham of Norfolk. In this the author named briefly describes the teaching of Hobbes, pronouncing a candid judgment on it; and I do not hesitate to add that judgment here, especially as the reader may find in its elegance some relief from the disgust aroused in him by the ravings of Hobbes:

"Who's this Colossus, that, with fearsome jaws
vast gaping, lies, stretching his length immense,
and, with foul vomit belching doctrines base,
soils either shore from every quarter round?
'Tis Malmesbury's Hydra, huge Leviathan
at play in ocean, Dragon Giant-like,
misshapen monster, beast of British birth—
so close that islet copies Africa
in bringing us perpetual novelty!
But, thank the gods! healing keeps pace with bane
and Litæ* follows hard on Ate's* steps.
The Hydra meets its Hercules: the isle
that gave the monster birth now deals it doom,
crushing the evil it itself has bred.
So did Bradwardin's† hand of old excise
the plague-spot of Pelagian heresy.
Just so, to-day, Templer, Apollo-like,
fells with a thousand darts the Python reared
by Hobbes, his fellow-islander. Lo, how
it totters, stricken sore! Mid hideous groans
the slender Mouse-tail‡ holds in its huge heart!
Lo, how the deadly poison of the barb
sucks at the marrow of the fallen beast!
Lo, how, dismembered quite, its festering throat
emits the last of its mephitic breath,
while with dense gore it dyes the distant wave!
So great a Triumph's glorious laurel-wreath
bedecks thy brows, most rightly worshipful!
Lo, how, with quickening steps, in what a throng
the gratulating chorus hastes, intent

* In Greek mythology Ate is the goddess of Mischief, and Litæ the goddess of Prayer: Litæ follows after Ate, undoing the evil she has wrought.—TRANSLATOR.

† Thomas Bradwardin, Archbishop of Canterbury, wrote *De causa Dei,* a treatise against the Pelagians, in the fourteenth century.—TRANSLATOR.

‡ *Myurus* is the botanical name of a grass bearing a barb-like top. I can think of no better explanation of the word here.—TRANSLATOR.

to swell th' ovation with their meed of praise!
Altars and hearths, all things of God and man,
the reverend Trinity—God, Angels, Souls—
Nature and Grace, the Commonwealth, the Church,
things of the Church's proper scope (Rule, Faith,
Orders, and Power of Keys, Canons and Laws,
Councils and Synods, Martyrs, Miracles,
Wealth temp'ral, Schools, Gymnasia of the mind,
Celestial Seats) and what is else Sacred
or Christian called, salute as Truth's ally
and champion and avenger, Templer, thee.
But, Hobbes, thou prophet of nefarious creeds,
and publisher of wisdom quite run mad,
trumpet and fist of impious Fatalism,
daft devotee of a material god,
famed artist of the Monocondyl creed,
wicked reviver of old heresies,
of patched-up falsities the pedler keen,
and Sower (in both senses)* of the same,
quit thy high seat and on the effacing sponge
cast thyself down and cease from blasphemies,
Happy if willing at the end to change
the false for true, twice wretched otherwise!"

Let us now leave Hobbes and his worse than barbarous philosophy, applying to him by way of epitaph the saying of Varro, "Hereafter no disordered mind will ever dream anything so unutterable that it can not be uttered by—Hobbes."

CXII. I gather from a letter written to me last year by a friend in the University of Oxford that, in addition to the commentators upon Natural Law already named, Jeremy Taylor, Bishop of Down in Ireland, is very highly esteemed in Great Britain; and my friend tells me that this writer, the Bishop, has published a book, written in his vernacular, called *Ductor Dubitantium,* or "The Rule of Conscience in all her general measures," and that in it he has treated in full of Conscience in general and then of Laws both Natural and Positive. I must leave any criticism thereof to others.

CXIII. I might describe, preliminary to discussion, the methods of many others, were it not, in part, that they are extremely defective and that many of them have adopted hardly any method in transmitting their teaching about Natural Law, only setting before us a number of natural precepts and rules—a method of philosophizing which used to

* There is a humorous jingle in the original: "Sartor Satorque," *i. e.,* Tailor and Sower. Some similar jingle seems needed in the translation in order to account for the odd collocation of ideas. "Sewer and Sower" is exact, but is unprintably ambiguous to both ear and eye.—TRANSLATOR.

be called Parænetic (admonitory). Very much of that kind are the writings of the Stoics and of Epictetus and Seneca; and it seems to have been the chief characteristic of Plato's works, too. Of more recent books, Martin Schoock's posthumous *Disputatio de jure naturæ* (th. 24) makes a threefold division of man's status, Ethical, Economic, and Political, and the writer adopts corresponding divisions for the teachings of Natural Law; but besides the fact that this division of status is not approved by the Aristotelians, it is not satisfactorily carried out by the author into practice. Better than all those named is the division employed in the Decalogue and followed by many writers, including Melanchthon and Guil. Grotius. As, however, in our opinion the third* commandment belongs to the Arbitrary branch of Divine Law and the adoption of the method of the Decalogue would hamper our discussion of the whole topic, we shall follow our unfettered judgment in the matter.

CXIV. While there is a Science of Morals which is independent of proofs, yet proofs founded on genuine and necessary principles are forthcoming; so the teachings of the Law of Nature which are obviously identical with the Science of Morals rest on their own principles, and these, according to the division of Aristotle (*Posterior Analytics* i, 2), are either Postulates, or Axioms, or Definitions. Accordingly, a methodical treatment of these teachings involves, firstly, an inquiry into the ultimate principle of Obligation and of Good Faith and Justice. The primary postulate, then, is the Existence of God. For, although this principle is attainable by the light of Nature, that result is not in the especial province of Moral Philosophy but in that of another department of teaching; and so in the province of Morals it must be classed among postulates. (Grotius, *De jure belli ac pacis,* bk. 2, ch. 20, n. 55, and *De veritate religionis Christianæ,* bk. 1, pr.; and Guil. Grotius, *De principiis juris naturalis,* ch. 5, n. 2.) A second postulate is the Existence of Divine Providence, by which God watches over all human affairs, and with the utmost goodness and justice; for the denial of God's existence and the denial of His care of human affairs amount to the same thing (Guil. Grotius, *ibid.,* ch. 5, n. 5). Lastly, a third postulate which the light of Nature shows to be inevitable, so that God and His Providence be not balked of Their aims, is the Immortality of man's soul, or at any rate its survival after his death. Now these postulates may be more difficult to prove *à priori* than *à posteriori,* yet indubitably they do admit of solid proof.

CXV. Whoever has seriously considered these postulates and their application to moral questions will easily perceive that in God all those things exist as attributes which are seen to be needed for these practical proofs. And he will, consequently, with the same ease draw

* In usual English numbering, fourth.

the conclusions from which it appears what the individual acknowledgments are which man is bound to make in reference to God; as, for instance, that He is the Supreme Lawgiver and the supreme depository of good faith, and must be worshipped. (Guil. Grotius, *De principiis juris naturalis,* ch. 5.) For although there are conclusions of Natural Law which are as patent as its principles, yet conclusions and principles must not be confounded; and, accordingly, the proposition " God must be worshipped " must be treated as a conclusion, not as a principle, and it being a matter susceptible of easy proof, any wanton denial of it exposes the offender to punishment. This punishment is in accordance with Aristotle's teaching in *Topica* i, 1, at end: " We ought not to call every problem or proposition into question. Only those doubts are permissible which arise from our weakness in reasoning power, not those which are so gross as to deserve punishment or which arise simply from obtuseness of perception; for those people who hesitate about the duty to worship the gods or to love parents deserve punishment, and those who can not be sure whether snow is or is not white lack a sense." And so by the Law of Nature any wanton denial of God's existence or refusal of His worship makes the offender liable to punishment, although this must not be pressed to the extent of holding those to be deserving of punishment under Natural Law who do not worship the same God as we do, or in the same manner. It would, then, be hard for Kings to find a defense or excuse for cruel expeditions against the Americans or others on the ground of spreading the Christian faith; the Pope's advice and authority afford no justification for them. For the duty of worshipping God, the Supreme Deity and Lawgiver, once being established, I do not think there will be any difficulty in recognizing, as parts of that Divine worship, that perjury and blasphemy and such-like offenses must not be committed and that God must be dutifully attended with the utmost love and respect. A corollary from this latter is that the Natural Laws of God must be obeyed. This universal obedience is sometimes called Piety and, so far as the Conscience perceives that it is bound thereby, Religion. Herein, as we see, the duties of the first table of the Decalogue are exhausted.

CXVI. Aristotle tells us that the three things, Society, Law and Friendship, are always found in conjunction (*Nic. Eth.* vi, 9, § 2). As regards the first and second of these, Cicero has an apt passage in his *Laws,* the prime society being taken by him to be between God and man and the second between man and man. " The prime society," says he, " is one of reason between man and God. Now where there is reason between any persons, Right Reason is common to them; and, as this Right Reason is Law, men must be admitted to be associated with the gods by Law. Further, when there is a community of Law in detail (*lex*) between any persons, there is also a community of Law in general

(*jus*) between them." I hold it for sure that there is a society between the person who binds by Law and the person who is bound thereby; yet the society which results between God and man is different in character from that between man and man. For, God being much and always the superior of man, the society between them is, by reason of this great inequality, a society by analogy (*Nic. Eth.* viii, 7, § 19; and ch. 12, § 21—where, I may point out in passing, the former passage is in my judgment corrupt). But man is associated with man, partly by the providence of God, in that men have received from Him not only a rational and social nature but also laws adapted thereto, and partly by their own act through agreements into which they have entered and laws which they have made, either binding inferiors to a superior or equals to equals, and this results in the development of fresh societies of one kind or another. The force of this we shall shortly see.

CXVII. Whenever God imposes an obligation on man, then, in correspondence with the different obligation of different natural laws, either man is required to perform something to God directly, or the individual man concerned must in his own interests do or abstain from doing something, or he must perform something to his fellow-men with whom he lives in society; but the object of nearly every obligation created between man and man is some performance by one party to the other or mutually each to the other. Now the society we are dealing with is that, already spoken of, between God and man, and the duties we are dealing with are the performances due from man to God directly; accordingly our immediate topic must be the things which God requires every man to perform to Himself. In that connection the first question must be, What is the ultimate end of man, so far as concerns him as an animal political by nature, ζῶον φύσει πολιτικόν? And that end I assert to be conformity or congruence of the human will, which is the proximate principle of moral conduct, with the Divine will as expressed in natural laws. In this congruence that Aristotelian εὐπραξία or εὐδαιμονία consists, which in fact is no whit different from the conformity mentioned. Ancient thinkers, accordingly, were absolutely right in declaring that the Highest Good of man lay in Assimilation to God. Whenever, then, man fulfils the will of God as promulged in natural laws and, so, expresses the primeval image of God in as exact accordance as lies in his power with the archetype, the Eternal Law of God, there occurs the Assimilation, ὁμοίωσις, which is commended by Plato, the supreme happiness of man, coupled with utter and unalloyed pleasure and tranquillity of mind; and, inasmuch as in this ultimate end man attains the utmost perfection of which he is capable in this life, the same ὁμοίωσις is held to be man's perfection, τελείωσις (Guil. Grotius, *De principiis juris naturalis,* ch. 3, n. 7).

CXVIII. Man, therefore, attains this Assimilation and Perfection when he renders to God, to himself, and to his fellows the things which are due to them respectively, and avoids the contraries. And just as God has ordained this end for man, so he has also granted him all the means necessary for attaining it, Reason and Appetite, conjoined with freedom; and has added various subordinate aids, such as a natural inclination towards Society, Speech, which is the natural instrument of Society, and, in the midst of vast wealth and widely diffused abundance, Want as an incentive, capacity to acquire by learning and teaching and practice, and such like. But because man's liberty of action is great, so that he can do or not do, do well or do ill, God has restrained this physical liberty by natural laws which forbid him from practising, or indulging in, all acts indifferently, and bid him confine himself to those which comply with the standard set up by natural laws and in doing which man's will is conformed to the Divine will.

CXIX. The actions which thus conform to that standard are otherwise spoken of as Actions of Virtue, for between the two there is no real difference, but only of standpoint; for, Virtue being always regarded as a perfection of its subject, actions of Moral Virtue receive that name because they are perfections of the human mind, or else they are called Honest because conformable to Probity, that excellence and dignity of human nature. But, so far as the same actions of Virtue are considered from the standpoint of their conformity to the standard of Natural Law and the Divine will, and are ordained for the purpose of holding society together, and regulating it and preserving it, they are spoken of as Just, and contrary actions as Unjust.

CXX. As, then, these Honest and Just actions are the means of attaining the end mentioned as prescribed by Nature, so also the performances which man owes either to himself or to his fellows under the Law of Nature, are furthered by those actions. Therefore they labor in vain, in my opinion, who propose to refer all the duties of mankind to a few universal laws and to fit them into these assumptions of theirs. For, although I do not deny that some natural laws are of wider application than others, according as they are nearer to first principles or more remote, yet it is beyond question that the mind of man is perfected by the practice of every one of the virtues into a conformity of its will with the Divine will, and, therefore, that human conduct is regulated by a large number of natural laws, some enjoining and others forbidding, in such a way that there is no duty which man is necessarily bound to perform that is not included within some natural law. If, however, you would fain ascertain one supreme principle of the natural laws or precepts of Virtue, it can be no other than this: The human will must conform itself in conduct to the Divine will. This in its turn admits of division under two heads, for God would have us either do

something or abstain from doing something. Right Reason, accordingly, is not slow to perceive that things honest must be done and things base be abstained from. The advantage of this process is that you perceive how demonstrations are linked one to the other in a sequence, at the end of which they fit into some one ultimate principle. Now all natural laws are universal propositions, and, individually, they lay down rules of conduct; and so they each individually serve as principles in their turn, and in this method minister to demonstrations.

CXXI. Accordingly, after any one has admitted the Postulates already mentioned and has by their aid demonstrated the duties which are called Piety in the highest sense of the word, being performances due under the Law of Nature by man to God directly, the next step will, I think, be for him to be taught what is the true end of man as prescribed to him by Nature, and what are the means which Nature has afforded him towards the attainment of this end, and by what subordinate aids those means are acquired. Now the means in question are the actions of Virtue; accordingly, we are concerned, first, with Virtue in general, and then with the several varieties of it and the conduct which follows on the habituation thereto—a method which Aristotle employed very rightly and with the happiest results in developing his political philosophy. Should any one, however, think it impossible to discover in this fashion the precepts of Natural Law, inasmuch as the obligation thereof extends to everything contained in the Law and the Gospel (*Decretum*, dist. 1 and 5), I warn him off this discussion as being too unenlightened, ἀπαίδευτος.

CXXII. When we approach the special doctrine of the Virtues, a certain number and order of them must be fixed upon, and to each of them individually those matters must be assigned which belong to it, and perfection in the practice of which teaches us how to conduct ourselves with propriety towards them, as if they were external objects. Now as the Law of Nature does not allow War except as a measure of the very last resort, I think that Bravery should be treated of in the last place of all, while Justice should be treated of in the first place. Justice is either Universal or Particular. We must deal with the former variety first, and then with the latter. This latter is in its turn twofold, Distributive and Contractual, συναλλακτική. The nature of Distributive Justice has not as yet, in my opinion, been satisfactorily probed and explained. Contractual Justice is concerned with Agreements, συναλλάγματα, these being either Voluntary or Non-voluntary. Some contracts are such that on their completed formation, followed by delivery, the ownership in the subject-matter of the contract is, or at any rate ought to be, transferred; these cases should, I think, be ranged under the head of Ownership, whether Original or Derivative. Now the theory of the Roman jurists recognizes four or five species of Real Rights, namely,

Ownership, Possession, Servitude, Security and Inheritance; and it will, I think, be readily admitted that Ownership is entitled to the first place in this list, so as to facilitate the enquiry whether the other Real Rights differ from it in kind or, perhaps, in degree. That one variety of Ownership is fuller than another will hardly be contested (Bachov, on Wesenbec, *Si ager vectigalis,* n. 1). Next in order after the discussion of Real Rights is that of Rights *ad rem,* that is, rights founded on Obligation; and as Obligation may arise from either Contract or Quasi-Contract or Delict or Quasi-Delict, all these different varieties are included under the word Agreements, *συναλλάγματα.* I admit that a certain kind of Obligation springs from Ownership (Grotius, *De jure belli ac pacis* ii, 10); but I prefer to follow the Roman jurists here and to derive the obligations which they name from the four principal sources mentioned. Allied to this is the topic of Civil Procedure and the natural methods in which a man may come by his own or what is due to him. Of these methods Guil. Grotius (*De principiis juris naturalis,* ch. 4, n. 9) indicates two: Recaption of that which has been taken from us without good cause and Retention of something we are bound to transfer, exercised until satisfaction of the price agreed on has been made. Further, agreements are either Principal or Accessory, and so this is the place for dealing with each of these varieties. From what has been said, it is clear that many heads of Natural Law are exhausted by a thorough treatment of this kind and may be discussed in the light of its rules.

CXXIII. The various kinds of Donation, including herein legacies, honoraria, and presents, *ἀντίδωρα,* must be scrutinized by reference to the rules of Liberality and Magnificence; and many other matters may be dealt with in the same connection, which relate to the commendation and practice of these virtues and to the avoidance of Avarice and Prodigality. The precepts of Temperance prescribe a limit to various pleasures and pains, so that under them matters may well be decided which concern marriage and the vices which are the enemies of marriage, and which concern frugality and sobriety and the contrary vices. Then restraints must be imposed on ambition or the love of honors, and on anger or the love of vengeance, seeing that many mischiefs originate in the excess of these passions; so on these points rules and precepts will be furnished by Magnanimity, Moderation and Clemency. And as it is important that there shall be no Lying in the familiar intercourse of daily life, and especially in contracts, Truth will furnish rules for checking this. Military matters will fall to be adjudged by the rules of Bravery. And I will not hide my opinion that Aristotle enunciated his views on that particular topic of the Virtues in an almost negligent manner; they can, however, be supplemented and amplified by reference to the writings of Thomas Aquinas (*Summa* II, ii,), and to Plato's *Laws,* and to Cicero's *Offices,* and to the *Digest* and other books.

CXXIV. I think that the value of any systematic treatise on the individual Virtues would be much enhanced if it comprised a collection of the general precepts about each variety of Virtue, these being the very Laws of Nature which afford an infallible standard for human conduct. For example, under the head of Particular Justice might be grouped the following and other like rules: Good faith must be implied in all details of contracts—with the consequences that there must be no malice or fraud or mistake or negligence in them, and, if such do intrude, reparation and redress are due; No one must enrich himself wrongfully at another's expense; Our property can not be transferred to another save through some act of ours; and The profits of a matter enure to the benefit of him who sustains the detriments thereof. The other virtues would supply other maxims. And in the case of a maxim which is so general that it seems commended to us not by one virtue only but by several, it might conveniently be subsumed under Universal Justice. For example: Honest things are to be done, base things avoided; Equality is a principle of greatest weight; Do not do to others what you do not wish done to yourself; A man must apply to his own case the rules he has laid down for others; Plighted faith must be kept (Guil. Grotius, *De principiis juris naturalis,* chs. 8 and 9). Whoever will adopt this method and properly consider, in regard of each virtue, the area of its objective application, and make a precise analysis of its constituent parts and of the department of human conduct with which each is concerned, and will adjust each of the virtues to its own natural laws, proceeding from primary or more general proofs to increasingly remoter conclusions, will, if I mistake not, obtain very happy and fruitful results from the trouble he has taken in the matter. And he will derive the most valuable assistance in the deduction and elaboration of these conclusions from the surviving writings of the old jurists, whether collected in the *Digest* or scattered about elsewhere.

CXXV. Men, then, no matter what Society they live in, ought to live according to Virtue, and in consequence the general laws of Nature are contained in these virtuous precepts; yet, as I said above, there is also a special Law of Nature which Nature has sanctioned for the regulation and preservation of its special Societies. Thus there are different rules for the Society consisting of Man and Wife, the Society consisting of Parents and Children, and the Society consisting of Master and Servant; to deal here with these one by one would not be foreign to our purpose, but we have already done so in our commentary on Grotius and will not linger on that topic now. (See Guil. Grotius, *De principiis juris naturalis,* ch. 10.) This important point may, however, be made, that the members of each of these special Societies should adapt their conduct not only to the general precepts of Virtue but also to the special rules of their special Society, thus obeying each kind of Natural Law, namely

the Universal and the Particular. Now where the obligation, to whichever of these two kinds it belongs, is the performance of a man's duty towards himself, such as to live temperately, to abstain from illicit intercourse and lust, or from gluttony or drunkenness, there is also to that extent a Society set up between man and God, so that man, by reason of the obligation thus issuing from God, is bound to the self-regarding act or performance in question. Every time that I express or have expressed that opinion, I would have it understood that, within such-like moral propositions of an affirmative character, the negative propositions are implicit; thus, if I say that all the precepts of Universal Justice are contained in the general rule, Live honestly, I must be understood to include, at the same time, Abstain from base conduct. Similarly, if I say that certain acts or performances are required of a man in his own interest by the Laws of Nature, I mean at the same time that there are certain things which the Laws of Nature require man not to do, but to abstain from and avoid. The latter are exacted by Prohibitive, and the former by Imperative, Laws of Nature. As regards the remaining Laws of Nature, they oblige men to performances due to their fellows with whom they live in Society.

CXXVI. And on this ground I think it correct to say that the sphere in which Law operates is Society, a doctrine which I know to be displeasing to others who take a different view. Of course the effect of an obligation of Natural Law, or the performance due under it, must be distinguished from the obligation itself. The obligation has God as its author, He having bound man to Himself in such a way that a perpetual Society exists between them, arising from the immutable obligation of Natural Law. Meanwhile, because the performance thus arising is either due to God directly or to the individual himself who is bound to render it, or is exacted in the interest of others with whom he actually lives in Society, or comes from his having received from Nature a personal inclination to live in Society with others, it is to a certain extent true that not all and each of the heads of Natural Law are solely ordained for the regulation of human Societies, since some apply to the case of a man living outside Society; yet the majority of natural laws, being developed for the sake of man, are of such a kind as to be in the highest degree adapted not only to the social nature of man but to the existence and preservation of the Societies actually obtaining among men. "Of all the matters that arise in the course of learned discussions, nothing is more excellent than a clear recognition of the fact that we are born for Justice; and if attention be paid to the unions and societies which men make with one another, this further point will become manifest, that Law is not the creature of opinion but of Nature" (Cicero, *Laws* 1). Further, we are taught in the Revealed Word that God has not only bound men to Himself as supreme Law-

giver but has also somewhat often joined them to Himself by the medium of a covenant. (See Calixtus, treatise *De pactis.*) What I have said is in harmony with the observation of Alexander Turaminus (*On the rubric De legibus,* ch. 4, n. 12), that the force of the laws of Nature is not derived from mere human Society and can not be referred to that alone, but that its activities have as their object either God, or one's neighbor and Society, or oneself and human nature.

CXXVII. Besides all this, the duties of Friendship must not be neglected. "Friendship," says Aristotle (*Nic. Eth.* viii, 1, §§ 18 and 22), "seems to bind a State together, and lawgivers pay more heed to it than even to Justice; where citizens cherish Friendship, nothing may arise to make them feel the lack of Justice." And in the *Politics* (ii, 2) he says that Friendship is the greatest good that can befall citizens. Since, then, in every society Law of some kind is found, and some kind of Friendship, too (*Nic. Eth.* viii, 9, § 2), the latter calls for the most careful attention on the part of any one who is proposing to set forth the Law of Nature in an orderly manner. And in our view Aristotle, in *Nic. Eth.* viii and ix, and Cicero, in his *De amicitia,* are more successful in the discussion of this matter than the majority of those whom we have so far met with. Now although, strictly speaking, no one can cherish Friendship with himself—for the definition implies a reciprocal good-will (*Nic. Eth.* viii, 2)—yet Love, through which Friendship exerts its force, may be felt for the same person as is loving; and, if he is conscious of being endowed with a preëminent kind of Goodness, he is, in an especial and not indivious sense, a self-lover, φίλαυτος (*Nic. Eth.* ix, 8). Nay, the very duties of Friendship, and those attributes whereby Friendship is defined, seem to issue from those qualities which every man wishes for and imputes to himself (*Nic. Eth.* ix, 4). And this is the meaning of the common saying, The right kind of Love is that which begins with the lover himself. If, then, we ought to be of service to the others with whom we live in Society, doing them good turns and consulting their health and safety and defending them against unlawful force, much more does the natural Love which rouses in us that desire and inclination suggest that we should first of all look after ourselves. If, then, Right Reason directs this Love, as is fitting, it is at once clear how great is the difference between those primitive natural qualities (πρῶτα κατὰ φύσιν, as the Stoics call them) which are found in man and those which are found in the brutes. I have explained this at greater length in my treatise *De duellis* (th. 2, onwards), where I have quoted passages which are much to the point here from Cicero (*De finibus,* bk. 3) and from Gellius (*Noctes Atticæ,* bk. 12, ch. 5). Any student of Natural Law, accordingly, who has brought his course of investigation up to this point will easily be able to describe all those things which the Law of Nature requires from man as duties owed to himself, in his own

interests—for instance, how man is bidden by Nature to protect himself, his life and his body, and to avoid things hurtful, and to search out and provide all the necessaries of existence, to experience the appetite for procreation, to order with prudence the whole course of his life, to link together past and present, and present and future, to prepare the amenities of life, to be led on by the imitative tendency and by the quest of Truth, and to ward off force with force. " For this law is not ordained, but innate. It is a law which we have not learned or received or read, but which we have seized and drawn and wrung from Nature's self. In regard of it we have not been taught, but made; not instructed, but imbued—namely, that when our life is in peril by snares, or force, or arms of robbers or foes, every measure of safety is honorable. For in time of arms laws are silent and make no claim on a man's forbearance, seeing that one who is minded to practise such forbearance will find himself suffering an unjust penalty rather than obtaining satisfaction of his just claims " (Cicero, *De officiis* and *Pro Milone*).

CXXVIII. Now as some Societies are of rational origin and others are instituted by man, so also there is one kind of Friendship which is natural and another which issues from human institution and discretion. Each kind of Friendship reposes on something Lovable or Good as its basis, whether that take the shape of the Honest or the Useful or the Pleasing; and there is a corresponding number of kinds of Friendship, but that kind which is based on the Honest is the chief kind (*Nic. Eth.* viii, 2, 3 and 4). What the difference between Right and Friendship is, we do not find discussed by any philosopher expressly and clearly; for the passage in *Nic. Eth.* viii, 7, §§7, 11 and 12, does not solve the question for us. A kindliness which has its origin in a natural union and inclination of dispositions seems to be the bond of natural Friendship; and according to the intensity of this union, so the resulting Friendship is of the greater or the lesser kind. Thus the greatest kind is found in the union of spouses and in the union between parents and children; but in proportion as the degrees of blood-relationship are less or more distant, so is the glow of Friendship warmer or cooler. Florentinus, then, was right in saying that Nature has created one kind of relationship among men (*Dig.* 1, 1, 3); so was Papinian when he said (*Dig.* 18, 7, 7), " The rendering of kindnesses is in the interests of mankind." When, however, the Rights which exist within these Societies are governed by Law, they are subjected to a rigid system of regulation. Now, although the rights which are due under natural laws and the offices of natural Friendship are in substance the same, and indeed are not distinguished from one another by Aristotle, yet I think that the obligation arises in different ways in the two cases. For the word " due " (*debitum*) is in strictness employed of what is due because Law, properly so called, sets up an obligation with a correspondent right of

action, at any rate in the forum of Natural Law. But the offices of Friendship are owed on another principle, and arise from an especial natural tendency towards kindliness and from a sense of union; and they are by preference offered of free will and not claimed as legal debts. (Grotius, *De jure belli ac pacis,* bk. 2, ch. 7, n. 4.)

CXXIX. Traces of this Friendship may be found in the texts of the olden jurists. It was customary law among the Romans that gifts between spouses were invalid; for they reckoned honorable love to be a spiritual matter only, and would not have marriage made venal, or harmony seem based on consideration received (*Dig.* 24, 1: 1 and 3, pr.). There is the same idea in *Dig.* 25, 3, 5, 3, where Ulpian neatly says, "These matters"—namely, the mutual support of parents and children—"being founded in equity and in the affection of kinship, the judge should take into account the needs of the individuals concerned." There is also a rescript to the effect that a son's heirs can not be compelled against their will to make those provisions which the son would if living render as duties of natural affection, unless the father has fallen into extreme poverty. And although Natural Reason prescribes that a son should maintain his parent, yet he is not compellable to pay a money debt of the latter (*Dig.* 25, 3, 5 (2, 16 and 17)). Consistently herewith, Justinian decreed it to be a father's duty to endow his daughter (*Cod.* 5, 11, 7); for the dowry takes the place of maintenance, and both are considered to rest on the same principle. (Hartmann Pistoris, *Obs. pract.* 2, qu. 37, n. 4; Carpzovius, pt. 2, *Jurisprudentia forensis,* const. 46, def. 20, n. 10, and pt. 4, const. 26, def. 2, n. 4.) Dowry, accordingly, was ranked among pious considerations, and many special rules were made in its favor. And on the authority of *Cod.* 5, 11, 7, the doctors frame the rule that the provision in question, though honorably made and abundantly, is a matter of liberality, not of obligation. (Add *Dig.* 26, 7, 12, 3.) And if a father, when providing the expenses of his son's studies, has not expressly intimated that he does it with intent to create a loan, he is presumed to have been fulfilling a debt of natural piety, and equity does not suffer the sum in question to be reckoned towards satisfaction of the son's portion (*Dig.* 10, 2, 50). And although debts incurred for funeral expenses are allowed marked priority, yet if the expenditure be made through natural dutifulness, the *actio funeraria* is refused (*Dig.* 11, 7, 14: 8 and 9 and 13.) And Paulus derives the gratuitous character of Mandate from the fact that it originated in dutifulness and friendship (*Dig.* 17, 1, 1, 4). The same may be said of the kind of loan called *Mutuum,* although the gratuitous character of this kind of service rarely appears, since the lender generally takes a stipulation for the payment of interest; it is, however, essentially gratuitous and is treated by Thomas Aquinas as an act issuing from the springs of charity (2, 2, qu. 78). This holds good also of the kind of

loan called *Commodatum,* it being a matter of voluntary courtesy, nay, of kindness, rather than of necessity (*Dig.* 13, 6, 17, 3). And this is even truer still of *Precarium* (tenancy-at-will), for it is declared to be entirely a matter of liberality (*Dig.* 43, 26: 1 (1) and 2 (2) and 8 (3)). And when a friend who is loved like a brother is instituted heir under his own name, the appellation " brother " is added thereto (*Dig.* 28, 5, 58). And on this score of Friendship many persons are not condemned in more than they can afford to pay, a privilege commonly styled *Beneficium competentiæ;* partners, for instance, enjoy this privilege. Why? Because " Partnership includes the rights of a sort of brotherhood " (*Dig.* 17, 2, 63). Let these illustrations of our theme suffice.

CXXX. I have roughly sketched a reasoned method in which I think that a system of Natural Law may be scientifically set forth. If, however, any one thinks there is a shorter way of doing it, let him by all means follow his own plan and judgment. Although I freely admit that a barren prolixity and redundance is to be avoided in every study, yet I can not justify an unduly restricted and compendious treatment of a grave and very various theme that penetrates into all departments of life, especially where the author desires to be exact and careful in his discussion, while at the same time avoiding all unnecessary topics. As I have now carried out my scheme of a general commentary on the Law of Nature, the just reader will not require of me a detailed description of this system nor a spun-out delineation of the various heads into which it may be divided. I will confess that at one time I projected a work of this elaborate kind and planned at least to pit my brains against it; but now I am wholly engaged in other juristic toils and my project has given way before the varied shocks of time, which indeed have seriously affected my health. So I pass on this torch to others. " For when a matter has been somewhat roughly sketched out to begin with, it must then be elaborated with nicer attention to detail. It seems within the power of any man to carry further a thing whose lineaments have already been well described and defined, and to set it off with limbs and joints. Time sets things of this kind going or helps to keep them going, and that is the way the arts were themselves developed and propagated. For any man is capable of adding to what is incomplete." So says Aristotle (*Nic. Eth.* i, 7 § 48, onwards); and the quotation is, perchance, so apt as to incite some generous mind to undertake the work in question, wherein I wish him all success, so that his abundance may make good what is so far wanting in this present essay.

CXXXI. But, some one may say, if the enquiry into the Law of Nature is so laborious a business, is there any profit in it? Indeed, it is very well worth the trouble; and this is so not only because by the observance of that Law we can, as some of great repute have thought, obtain

eternal life. Clement of Alexandria, in his *στρωματεῖς* or *Centones* (bk. 7), declares that sufficient for salvation was furnished to the Jews by the Law of Moses and to the Gentiles by their philosophy, before Christ's coming, and also by what he calls the universal calling (*vocatio*) of Jews and Barbarians into one people. And, albeit the knowledge of God which the Gentiles had was, as he admits, *ἀμαυρά,* dark, he nevertheless inclines to the view that men might be saved by even such a knowledge of God. And so in more than one place he calls the Law and Philosophy two Testaments, furnished by the same Lord to different peoples for the same end. By Philosophy, however, he means such a knowledge as avails for man's justification, saying in bk. 1, " Philosophy was of old a justification in itself to the Greeks." And Justin Martyr, in his *Apologia,* holds that no valid objection could be raised against Christianity on the score of its novelty, seeing that its author was Christ, *λόγος τοῦ θεοῦ,* the Word of God. And then, going on to interpret the word *λόγος* as Reason, he says that those who have ordered their life *μετὰ λόγου,* with Reason, ought to be deemed Christians: such, says he, among the Greeks were Socrates and Heraclitus; and among the Barbarians, Abraham, Ananias, Azarias, Misaël, Helias and many others. Similarly, Justinus, postulating that Christ was *λόγος οὗ πᾶν γένος ἀνθρώπων μετέσχε,* Reason in Whom the whole human race shared, continued his discourse as follows: " Christ was in part known by Socrates: for He was and is *Λόγος,* Reason or the Word, such as is in every man; and is He Who in part foretold things to come, through the prophets, and in part taught them in His own person." Let us also hear the words which Chrysostom uses on this topic (*On Matthew,* Homily 38), " Some one will say, What, is wrong done to those who lived before the coming of Christ? In no wise. For in those days a man could be saved without confessing Christ, seeing that what was required of them was not this, but that they should keep themselves from idols." And a little later he says, " It was in those days sufficient for salvation to know God. But not now, a knowledge of Christ being necessary in addition." And not much further on, " Even they will enjoy all the blessings of eternal life who, though ignorant of Christ before His incarnation, yet kept themselves from idols, worshipped one God and lived as lofty a life as was then possible." For the way in which interpretation lessens these advantages, consult Casaubon, *Exercitationes ad Cardinalis Baronii prolegomena* 1, where he tells of other ancients who leaned to the same views and gave identical expression to them.

CXXXII. More modern writers have also adopted this opinion: Andreas Vega (*Commentarius in aliquot Concilii Tridentini decreta,* bk. 6, chs. 17 and 20); Maldonatus (on *Matthew,* ch. 9, v. 22); Pererius (disp. 18, on *Epistle to the Romans,* ch. 1); Dominicus de Soto (*De Natura et Gratia,* bk. 2, ch. 11), but he is believed to have returned to

sanity. Joannes Sleidanus, in his *Commentarii de statu religionis et reipublicæ Germanorum sub Carolo Quinto* (bk. 23), tells us, " A Franciscan was expounding St. Paul's *Epistle to the Romans* before a large audience and took the opportunity to make a bitter attack on Luther and his friends, and went so far as to declare that those who had no knowledge of Christ were saved if in other respects they lived an upright life." And Franciscus Puccius attempted the same task in the book which he published, *De Natura et Gratia erga omnes homines,* which called forth the opposition of Franciscus Junius. Huldricus Zwinglius is said to have attributed to Theseus, Hercules, Seneca and other heroes of the Gentiles an especial revelation of Christ, and salvation. Theobaldus Tammerus, Professor in the University of Marburg, who made Conscience and Creature the two chief headings of his system of Theology, tried to propagate the same doctrine, and Samuel Huber, of Berne in Switzerland, is said to have done the same, being condemned therefor by the Synod of Berne. Now error is, as Valerius Maximus says (bk. 9, ch. 6), akin to cupable rashness, and this you may perceive here; and as no one has been caught in the case before us by its excessively crude and obvious error, we will not concern ourselves with refuting it. Six hundred passages in the Revealed Word furnish solid proof that none can share in salvation outside the Faith and Christ.

CXXXIII. Come, then, let us see what is the utility of a knowledge of Natural Law. He who rightly pursues his enquiry into it will in the first place get in some sort to understand what is that Image of God in which man was originally created. That it consisted before everything in Justice and Holiness, we have the Apostle's warrant (*Ephesians,* ch. 4, v. 24; *Colossians,* ch. 3, v. 10), so that man can not only readily ascertain the Divine will and distinguish what is to be done from what is to be left undone, but also can exactly conform his own will and conduct to the Divine will and render perfect obedience to the Law of God. Other points of theological controversy relating to the Image of God I gladly pass by. Now after the first-create threw away this perfection by their disobedience (*Romans,* ch. 5, v. 10), and had begotten issue in their own likeness (*Genesis,* ch. 5, v. 3), and the light of their intellect was darkened and the inclinations and disinclinations of their appetites had begun to be varied and vast, there was yet left to man Reason; and this Reason, contriving to retain a certain degree of Rightness, recognized and promulgated the Law of Nature which is written on the heart, and controlled and curbed by its authority the activities of the soul. For although fallen man can not exactly conform his will to the Divine will and his conduct to the standard of Natural Law, yet it remained as binding on him after as before the Fall. Therefore, there hence comes a second vast utility of this study, and one of the very first importance, namely, that fallen man may thereby know how he ought to

shape his conduct in all vicissitudes of life, what he ought to follow, what to avoid, and to what rules to adapt his conduct, even if he can not render as prompt and willing and perfect a service as before.

CXXXIV. Now just as Vice has power to corrupt principles, so Reason, when corrupted by badness of character and example, only imperfectly recognizes Natural Laws; God accordingly has repeatedly re-asserted some of them, and those which He especially promulgated anew on Mount Sinai, with awful solemnity, come to us under the name of the Decalogue. Of this Decalogue it may be remarked that, with the exception of the third * Commandment, about Sabbath-observance, its contents bind every man without privilege or dispensation or variation. The study of Natural Law is, therefore, useful, in the third place, for the right understanding of the Decalogue and the whole Moral Law. Now, if man be unable to render to these the perfect obedience which they, nevertheless, demand, God's especial favor has devised for him certain remedies which Revealed Theology tells him of. So, in the fourth place, this study not only helps man to grasp the difference between it and Natural Theology, but also brings into clear relief the inadequacy of our own strength for living a good life in perfect conformity with the Divine will, and, on the other hand, the greatness of God's grace to us-ward, whereby we are released from the rigors of this schoolmaster (*Galatians,* ch. 3, vv. 24, 25) and whereby our weakness is under-propped through the Holy Spirit's agency, so that the Law is no longer imposed on the just man—not that he is not bound by the Law, but that he is not so much kept from sin by the fear of the penalty which the Law threatens as led by the Holy Spirit into a willing obedience to the Law and into doing what is pleasing to God, whereas it is the fear of punishment which alone checks in men of shameless wickedness the lust of sinning (*1 Timothy,* ch. 1, v. 9).

CXXXV. Again, the study of Natural Law helps us to see how all Societies, and especially States and Commonwealths and Free Peoples and Princes, are bound and preserved in a marked degree by the fetters which it imposes. For as every Commonwealth is autonomous, and one Commonwealth is not subject to the laws and tribunals of another, and as Commonwealths do not recognize any common human superior, save where they have by treaty set up one among them (such as, if I err not, the Areopagus was in olden days for the peoples of Greece), it needs must be that controversies between these Commonwealths be settled by the Law of Nature and before the common tribunal of all mankind. If they make use of the Law of Nations, whether general or special, and can decide their disputes by a reference to it, its authority is indeed great; but apart from this Law of Nations and a common tribunal of conventional origin and competent authority, if such there be, the causes

* In ordinary English reckoning, fourth.—Translator.

and conduct in question ought to be examined and despatched in accordance with the Law of Nature, because all and each of these Commonwealths are subject to its obligation and ought to respect and dutifully admit the authority both of it and of Divine Providence, its author. And so it was well spoken by Camillus to the Faliscan chieftain, "Between us and the Faliscans there is no Society created by human agreement, but there is and will be such a Society as Nature has created for us both" (Livy, bk. 2). This example also shows how mistaken they are who would trace the origin of all tribunals to a human origin only. Selden's doctrine is better (*De jure naturæ et gentium,* etc., bk. 7, ch. 4), and it is confirmed by Bœcler (on Grotius, bk. 1, ch. 3, § 1, p. 192, onwards) and by Robert Maranta (*De ordine judiciorum,* p. 3, n. 132).

CXXXVI. Now this study can not be bounded within the limits of a single intellect, but must with laborious discernment be gathered from varied sources; and a very great share in establishing and enriching it is taken by the laws of those Commonwealths which have excelled others in legislative wisdom. Among these, it occupies a preëminent place in the excellent Roman Law; and, inasmuch as the *Digest* is particularly abundant in incomparable instances of Natural Law and displays side by side with this numerous laws of a purely arbitrary character, the exhaustive enquiry into the Law of Nature is of service in enabling us to make an exact discrimination between the parts which are Natural Law and the parts which are Positive Law. For, as controversies between Free States must be settled by the former and not by the latter, much contention often arises when some of these States allege that matters of Positive Law are being pressed on them as well as matters properly issuing from Natural Law and having a Natural signification and bearing (*Dig.* 18, 7, 5).

CXXXVII. There is no one but knows that Roman Law has always and deservedly been held to be of highest authority, in part because the Roman practice was to introduce their laws in any place which their arms added to their Empire and to require the reception of their Law in those conquered realms to which was given the status of Provinces; in part also because other peoples perceived that Roman Law was based on the highest wisdom, and that equitable principles informed it, and that in it the Law of Nature was unfolded with great exactitude, and so to that extent the practices of Roman Law were also their own; and in part because other peoples were led by mere opinion and report and imitation—nay, even by mistake, and that not a single one—to adopt that Law themselves indiscriminately, in their ignorance of the difference between things arbitrary and things natural and in their inability alike to distinguish Commonwealth from Commonwealth, according to the laws which are suitable for each, and to frame laws for themselves by their own genius and discretion. Although, then, numer-

ous peoples adopted Roman Law—the Kings of Spain calling it their Common Law, the Jews resorting to it when the Mosaic Law was silent, and even the Turks deciding cases by reference to Justinian's Code—yet it is demonstrable that the Romans never enacted laws for the whole world or declared that their Law should be ranked as the Law of Nature and of Nations. In support of this, Arthur Duck (*De usu et autoritate juris civilis Romani,* bk. 1, ch. 2) has collected a mass of evidence from the jurists, expatiating on his thesis with even excessive detail.

CXXXVIII. For although the Roman legal system be held in highest esteem, and ought to be so held everywhere, yet free peoples who have been wise enough to receive it, defer to it as containing, and so far as it contains, a minute and ample treatment of Natural Law and equity. And Ludolphus Schraderus, therefore, said with guarded correctness that free Princes and peoples, not subject to the Roman Empire, are bound by the Roman Law, in matters not settled by their own laws and customs, so far as it is based on Natural Reason. And so those free States, if any such there be, which have received the Roman Law not only where it unfolds Law Natural but also the large mass of its arbitrary portions, retain their own liberty in the adoption of these latter and also in abrogating them where it seems advisable. But in such States as have not received the Roman Law by such agreement or consent, it certainly can not, in its arbitrary portions, be forced on them against their will as a canon for the decision of disputes. Jacobus Gothofredus held very sound views hereon, saying, in his dissertation *De imperio maris:*

" Absolutely free realms and peoples of to-day use Roman Law as being a source of the good and equitable, and those who use it otherwise are, verily, over-compliant and heedless of their own interests; for the present-day condition of realms and peoples has taken on quite another shape than the Roman Empire of earlier times, and it is absurd for any one of them to make a fetter for itself out of the Roman Law. The French act in this respect with entire wisdom, deferring to the Roman Law where, and so far as, it is a source of the good and equitable; in so doing they both show a proper sense of their own dignity and tread the right path in the development of their Law."

CXXXIX. What wonder, then, that free peoples, during controversies with others, have repudiated this or that rule of Roman Law which was antagonistic to their interests as being—or so at any rate they believed—derived merely from the good pleasure of the Romans and therefore not affecting themselves. A notorious illustration is the dispute among the competitors for the throne of Portugal about the doctrine of Representation. This was contested by the best-known jurists of Spain and Italy, their writings appearing at Bologna and elsewhere. Philip II of Spain would not admit Representation, maintaining that it

was only a doctrine of the arbitrary part of Roman Law; but the present rulers of Spain attach the highest importance to the doctrine. Another frequent subject of dispute was the law of Primogeniture; and it was believed, as Justinus tells us (bk. 16), that King Ptolemy of Egypt offended against the Law of Nations by bequeathing his throne to the youngest of his sons. So also the Roman Law contained in its arbitrary and positive part rules about the acquisition and transfer of property which free peoples and princes will not consider to affect themselves in the least. I am well aware that even the just cited illustrations are commonly referred to the Law of Nature; I am not now concerned, however, to dispute this but only to give a warning, when it is said that some thing is founded on Natural Law or equity or is agreeable thereto, that these and similar forms of expression are ambiguous and that it is often an extremely difficult thing to settle whether a thing really belongs to Natural Law or to Arbitrary Law. But the more successful a man has been in his study of Natural Law, the better able will he be to distinguish it from Positive Law and to take cognizance of the weighty controversies of great Princes and Commonwealths.

CXL. Lawmakers, too, have much interest in the cultivation of Natural Law, lest they should sanction a law opposed and contrary thereto. Now this can not be done so as to create a legal obligation, but the lawgivers who enact such a rule, and the subjects and judges who accept it, do wrong, as I have shown above. Even in the admirable body of Roman Law there are laws which are like deforming blemishes, such as those laws which entrust the power of life and death over children and slaves to the caprice of fathers and masters. The cruelty of these and of the *Senatusconsultum Syllanianum* is abhorrent to the Law of Nature. This Senatusconsultum was occasioned by the fact that the urban prefect had been murdered in his own house, so Tacitus tells us; and under it four hundred slaves were put to death, without distinction of age or sex, and even those whose innocence was beyond doubt. (See also *Cod.* 9, 14, and *Dig.* 9, 2, 2, where slaves, in despite of the Law of Nature, are treated as in the same class with four-footed beasts.) "You ought to ask, in the case of a slave," says Seneca (*De clementia,* ch. 18), "not how much he can with impunity be made to suffer, but how much the nature of the good and equitable allows you to inflict." And also, in the same place: "Albeit against a slave all things are lawful, yet there are things which the common law of living things prevents being lawful against a man who is of the same nature as you yourselves." *Cod.* 9, 18, 4, wherein Constantine permitted the practice of magic for the healing of the sick or for averting damage and rain and hail from vines and crops, is utterly unworthy of a Christian Emperor. And although some try to help the Emperor by a convenient interpretation thereof to the effect that this law of his must not be taken to apply to

incantations, but to lustrations of the land, accomplished by publicly chanted litanies (*Nov.* 123, ch. 32), yet the words of the enactment only too clearly show the futility of this interpretation; and Jacobus Gothofredus (on *Theodosian Code, De maleficiis et mathematicis,* l. 3) takes Albericus Gentilis to task on this score. The law was afterwards quite deservedly repealed by Leo (*Nov.* 165); and it is omitted from the *Basilica,* as may be seen in bk. 60, tit. 39. And Balsamo (on the *Nomocanonus* of Photius, vol. 9, ch. 26) is a witness to the same effect. A mark of suspicion must also be affixed to those laws whereby suicide on the ground of weariness of life or the disgrace of debt and similar grounds is allowed, or at any rate freed from penalties (*Dig.* 28, 3, 6, 7; 49, 14, 45, 2; 48, 19, 38, 12; 49, 16, 6, 7; 3, 2, 11, 3). And doubly impious in its offense against the Law of Nature is the exemption from punishment provided by the rule in *Dig.* 48, 21, 3, 5. In this rescript, according to Marcian, the Emperor Hadrian ordained that where a father committed suicide because he was said to have killed his son, it must be taken that the motive was grief at his son's death; and so the father's property was not to be put up for public sale.

CXLI. How shall I tell how useful—nay, more than that, how necessary—this study is to judges and jurists, in order that they may fitly apply the law to each case that comes before them and rightly interpret all varieties of Law? How can any one form a right judgment on a matter of conduct and its surrounding circumstances and its deserts, without a thorough knowledge of the principles of this branch of study; or determine consequential questions of the doer's liberty and intent and design and purpose, or points of fraud or mistake or force or coercion; or declare with observance of due degrees whether an action be just or unjust? That is why you find the older jurists so often qualifying their opinions by the phrase, "Having regard to all the particulars of the case." Alphenus, when once consulted on a point of conduct, replied, "The law to be applied depends on the facts of the case" (*Dig.* 9, 2, 52, 2); and Marcian said (*Dig.* 48, 8, 1, 3), "In these circumstances this must be taken to be the law." Indeed, Natural Law must be resorted to in order to make good the shortcomings (ἐλλείματα) and defects of every arbitrary law; for the latter obviously can not provide for all the questions and individual cases that may arise, and so recourse must be had to the Law of Nature and natural equity. That is what the saying of Pomponius (*Dig.* 39, 3, 2, 5) points to: "This is what equity suggests, there being an absence of law on the subject." And so does Modestinus: "This is a sufficiently obvious matter from the standpoint of Natural Justice also." Further, the study of Natural Law affords so indispensable a practice, in the interpretation of Law, that those who are ignorant of it, or who slight it, can neither deserve the name of Jurist nor keep it when once given them. If, for example, any

one has pursued the study of Roman Law only up to the point that he knows what things it pronounces lawful and what unlawful, but without enquiring into the logical basis thereof or tracing conclusions to their underlying principles or deriving decisions from genuine reasoning, he has but got an historical knowledge of that Law; and, if he fancies himself a master of it, it will not be anything but what the Philosopher calls κατὰ συμβεβηκός, by accident. For "to know the Law is not to fasten on its words but on its substance and force," says Celsus (*Dig.* 1, 3, 17).

CXLII. Although this study has for many centuries seemed cast aside like an old-fashioned and worn-out garment, yet the Laws of Rome and other States have been expounded by extremely able men, and some persons, screening themselves under their example, have openly contemned and vilified the study of Natural Law. This, however, does not shake my convictions. For, although many commentators on Law have grasped the truth by dint of especial diligence and sagacity, yet this must not be attributed to true science but to the singular good fortune of their genius, nay, even to Divine Providence, seeing that in other cases it is clear that ignorance of this study has produced so many intricacies of errors and varieties of opinion, and commonplaces against commonplaces, as the saying is. In order to extricate ourselves from these perplexing labyrinths, those who receive and deserve the praise of true Jurisprudence can adopt and advise no other method, at any rate no better method, than the diligent cultivation of Natural Law. Let any one versed in Natural Law ponder on the whole *Digest* and he will perceive that the just and equitable conclusions of the jurists found therein were based on a solid knowledge of that Law. In olden days Salvius Julianus wrote a book *De ambiguitatibus* and Herennius Modestinus one *De enucleatis casibus;* if these survived intact, I think that the truth of my last remark would be more clearly demonstrated to the incredulous. And so some more modern writers have labored in the study of Natural Law with a view to show the sources of correct interpretation: Raymundus de Forolivio (*De interpretatione in genere*), Constantinus Rogerius (*De interpretatione juris*), Stephanus de Federicis Brixiensis (*De interpretatione legum*), Lanfrancus de Oriano (*De interpretatione statutorum*), Mantica (*De tacitis et ambiguis conventionibus*), Simon de Prætis (*De interpretatione ultimarum voluntatum*), Camillus Gallinius (*De verborum significatione*). What more can I say? Equity must be held in especial esteem by judges and jurists, and an especial care of it is demanded from them by the laws (*Dig.* 13, 4, 4, 1; *Cod.* 3, 1, 8). And as Equity must be tracked in the recesses of this study, and Jurisprudence itself is accordantly described as the art of the good and equitable—since a jurist, when bent on the interpretation of the Law, must put the pursuit of Equity in the very forefront of his labors—it is clear to every one that there is unlimited scope for the

operation of Natural Law and that jurists and judges ought to outstrip all others in the pursuit and study of it.

CXLIII. Osiander, in the treatise often referred to above, shows that the advantages of the study of Natural Law may be placed under three heads: (1) The search after God (th. 61). (2) The pursuit of honesty (th. 70). (3) The preservation of justice and external discipline in human society (th. 73). He also points a warning finger to the fact that some, as regards the practice of this Law, have erred by excess and others by defect. In the former class, says he, may be put Sixtus Senensis, Casaubon, and Montacute, and he shortly afterwards adds Andradius, Franciscus à Victoria, Pererius, Casalius, Maldonatus, Zuinglius, Edward Lord Herbert, Marcus Antonius de Dominis, and certain Arminians and Wigelians. In the other class he ranges Szydlovius and, among others (but undeservedly, if I mistake not), Hugo Grotius. And he then attacks both classes at tolerable length.

Let this suffice as a dissertation on the Law of Nature.

Mindful of my promise, I will now throw in, as a kind of supplement, some remarks on Moral Virtue and a Good Natural Disposition.

Of Moral Virtue.

I. Each of the many and manifold Faculties of the human Soul (which I already have often mentioned) has its proper function assigned by Nature, so that there is no waste of effort; and each Faculty performs its functions rightly when it is equipped and perfected by the Virtue correspondent to it. In the absence of that Virtue it will be just as likely to perform its functions ill as well, but when equipped with that Virtue it can not but act well and rightly. Now there are two preeminent Faculties of the Soul, Intellect and Appetite; and each of them is perfected by its appropriate Virtue. By the aid hereof the Intellect can see and declare the difference between the True and the False, affirming the one and denying the other. The Appetite also is provided with the support of its own Virtues, in order to prevent mistakes in the quest of the Good and the avoidance of the Bad. " What in the case of the Intellect is Affirmation or Negation, is in the case of the Appetite Quest and Avoidance " (*Nic. Eth.* vi, 2, § 4). " Upon this division and difference which exists within the Soul, is based a correspondent distinction and division of Virtue; for there are some Virtues which we call Dianoëtic and others which we call Moral " (*Nic. Eth.* i, last ch., §§ 31, 32). If a comparison be instituted between these Virtues absolutely considered, there is no doubt about the superiority of the Dianoëtic over the Moral; all the same, in moral enquiries the Moral Virtues possess a first-rate significance.

II. It is not my purpose at the present time to unfold the Moral Virtues one by one or any particular instance of them, but, with a view to the fuller understanding of the Law of Nature, to bring out the nature of Virtue generally considered. And, following Aristotle's method, we will first ask, What is its efficient Cause? This, in Aristotle's opinion, is not single but threefold: *φύσις, λόγος* or *διδαχή*, and *ἔθος*; that is, Nature, Teaching, and Habit (*Nic. Eth.* x, last ch., § 7, onwards; and *Politics* vii, 13 and 15). Plutarch, too, requires *φύσις, μάθησις* and *ἄσκησις*; this is, Nature, Teaching and Practice. Nature (*φύσις*) and *εὐφυία*, what Cicero calls *naturæ bonitas* (Natural Goodness), impart with liberal hand an especial innate tendency to imbibe the Virtues with ease and completeness: " Each Moral Virtue seems in some sort to exist in every man by nature " (*Nic. Eth.* vi, last ch., § 3). Now how these Natural Virtues differ from the Moral Virtues we will briefly show by the aid of *Magna Moralia* ii, 3. In the case of the Natural Virtues we only require an unreasoning impulse towards Probity, while we call Virtue perfect when

it is conjoined with Wisdom—not, however, that it makes for Probity without any natural impulse thereto, for one Virtue is not opposed to another; but the part contributed by Nature towards perfect Moral Virtue will appear more clearly in the second Excursus hereto.

III. Many of the ancients attributed to Nature a greater share than is just in the production of Moral Virtue, and no single argument suffices to destroy that teaching. We have, to begin with, an instance of such a principle in *Nic. Eth.* ii, 1, § 5: "None of the things which exist naturally can be shaped by practice otherwise than Nature has provided." And Aristotle shortly afterwards gives two examples to illustrate this: "A stone has by nature a downward motion, and no amount of practice, not if one were to try by ten thousand upward throws, could give it an upward tendency; nor will flame ever be made to fly downwards." A second principle is enunciated (*ibid.,* § 7) in the following: "With regard to the things that come to us by Nature, we first receive their potentialities and later their energies or activities." For, says Aristotle, we have not acquired the faculties of Sight and Hearing by repeatedly seeing and hearing; but we see and hear because Nature has already endowed us with the potentiality thereof. But, in order that a man may act in accordance with Virtue, he must needs endue himself with that habit by repeated appropriate behavior. In this respect Virtue is like the Arts. For no one will without art make and fit a joint into a house with exactitude, or play on the lute if he has not learned the art thereof; nor will any one be just and temperate in his life and conduct without having acquired a habit of justice and temperance. And Aristotle gives further arguments, which, however, I omit.

IV. Teaching is of the very first importance in the acquisition of the Dianoëtic Virtues (*Nic. Eth.* ii, 1, § 2), but this does not hold of the Moral Virtues. In *Nic. Eth.* x, last ch., § 14, is the passage, "Reason and Teaching are perhaps insufficient causes to produce (Moral) Virtue." Certainly Instruction and Teaching avail somewhat in enabling a tender mind to get to understand what is right in life and what not; but capacity to give a firm assent to this Teaching and to follow what is shown to be right, and flee from what is bad, the soul receives from elsewhere, and not from Teaching. Hence Aristotle neatly compares those who are given to philosophize, or to hear others philosophizing, on morality, but are disinclined to give assent thereto or to practise it, to sick persons who consult doctors and discuss with them how to recover their health, and have their prescriptions made up but do not take them. Just as the latter will never obtain a restoration to health in that way, so the former, says he, will never become good or happy (*Nic. Eth.* ii, 4, § 17, onwards).

V. The requisite Habituation is of the utmost moment, as the equivalent Greek word shows. For this Virtue is called ἠθικὴ (Ethic)

ἐξ ἔθους (from "custom"), as being obtained by definite Habituation (*Nic. Eth.* ii, 1, § 3). There are several passages in Aristotle which show the force of this, and especially *Nic. Eth.,* last ch., § 14, onwards: "The hearer's mind must first be cultivated by habits in order that he may properly rejoice or grieve, in just the same way as the earth must be properly tilled in order that it may acquire the faculty of yielding increase." Nay, he says in another place that just as a man becomes a lute-player by much striking of the lute, and a good lute-player by correct striking thereof, so men are rendered temperate, just and brave by accustoming themselves to the pursuit of temperance and to just and brave deeds, while those who give themselves to the opposite kind of conduct gradually become, by that Habituation, intemperate and unjust and cowardly. Wherefore Aristotle gives us the following grave admonition (*Nic. Eth.* ii, 1, §§ 19, 20): "We must then give good heed to adapt our actions to a definite type. For varying and dissimilar habits follow on differences in these actions. It is, then, no small matter, but a very great one, whether we accustom ourselves from boyhood to this or to that conduct. Aye, everything is wrapped up therein."

VI. This Habituation, as is clear, must needs be set up in a definite manner if Virtue is to be generated by it; for if the wrong manner be employed, so far from Virtue being generated, Vice will rather be. Two points, then, call for consideration here: first, the active Subject itself which is in the course of acquiring Virtue by much observance of it; and, second, the kind of conduct which is required. For no one will be Just or Brave merely by means of just and brave deeds; because, besides the question whether any deed is Just and Honest, there is the vital question whether it was done in a just and honest spirit. Unwillingly to repay a loan or return a deposit is to do what is just, but not to do it justly. So, for a man to be truly Just, his conduct must be conformable to the rules of Justice and his soul must be affected and disposed like that of one who is really endued with the habit of Justice and carries that out in practice. Aristotle indicates this in the passage (*Nic. Eth.* ii, 4, § 15), "A man is just and temperate not by reason of doing just and temperate things (τὰ δίκαια καὶ σόφρονα), but because he does them in the spirit of a just and temperate man."

VII. How, accordingly, the doer or his soul must be affected and disposed, Aristotle tells us in § 7, *ibid.:*

"That the works of Virtue are justly and temperately performed, consists not in the fact that they are of a certain kind, but that the doer does them in a manner conformable to certain conditions. Of these the first is that he acts knowingly, εἰδώς; the second, that he acts προαιρούμενος, with deliberate intent, nay, προαιρούμενος δι' αὐτά, with intent to kindle in his purpose an ardor for what is honest. Lastly, what he does must be done with a firm, enduring and constant will."

With these qualities must he be endued who would be entirely good; and, if you weigh them properly, they are all summed up in perfect προαίρεσις (deliberate purpose), for this includes knowledge and, at the same time, a constancy of conduct. Knowledge he must have. What he does he must do προαιρούμενος, and not unadvisedly or accidentally, but with intention and careful preliminary deliberation. And these honest things he must do προαιρούμενος δι' αὐτά; that is, with an ardent love of what is honest, and not for any extrinsic motive of cupidity or fear—in a word, there must dwell in him the constant purpose ever so to do and not otherwise.

VIII. Concerning the requisite qualities of the conduct in question, Aristotle discourses with subtlety. I have already said that moral habits are engendered by conduct in such sort that, what the conduct is, that will be the resulting habit, Virtues springing from good conduct and Vices from bad. Aristotle's theory is that all Virtue, whether Moral or Dianoëtic, perfects its Subject; for what is the Virtue of an eye or a horse or a man but the perfection of those Subjects? Aristotle's words are, " I assert that all Virtue both renders that well-affected of which it is the Virtue, and makes its work right and perfect " (*Nic. Eth.* ii, 6, § 2). Let this, then, be noted in the first place, that Virtue perfects both its Subject and the activities of its Subject.

IX. Next we must observe that, Virtue being generated by actions like itself, Actions considered generally are capable of either Excess or Defect or the Mean. This is shown in *Nic. Eth.* ii, 6, § 7, as follows: " In everything which is continuous, yet divisible, we can have both More and Less and Equal." From this he deduces the following: Actions and Emotions are something continuous, yet divisible, συνεχὲς καὶ διαιρετόν; therefore in Actions and Emotions there is room for More, Less, and Equal; that is to say, for too much, too little, and just enough. The minor premise of this syllogism he proves as follows (*Eudemian Ethics* ii, 3): ἡ μὲν γὲ κίνησις, συνεχές. ἡ δὲ πρᾶξις, κίνησις, " Motion is something continuous; now action is movement." The principles applicable to Emotions are the same. Thus, we can be angry or grieve or rejoice, either with excess or defect or within proper limits and moderately; and so with regard to other Emotions. Emotions, indeed, are not essentially continuous and divisible, but only accidentally; for Quantity can not be predicated of them, yet they are considered divisible in regard of movement, the intensifying, ἐπίτασις, or the relaxation, ἄνεσις, of which can be either over-violent or over-restrained or moderate. (See *Nic. Eth.* vi, 1, § 2.) Now here Aristotle has taken pains to discharge the office of a good teacher and to adapt himself to the comprehension of his hearers, who were versed in mathematics; and so he not infrequently intersperses mathematical hypotheses and propositions in his practical teaching.

X. Advancing from this standpoint, Aristotle goes on to expound how Actions which err by Excess or by Defect corrupt and destroy their Subject and its activities, while those alone which are in the Mean perfect their Subject and its activities. τοιαῦτα πέφυκεν ὑπὸ ἐνδείας καὶ ὑπερβολῆς φθείρεσθαι, says he (*Nic. Eth.* ii, 2, § 10) ; that is, Things which are by nature capable of either Excess or Defect or the Mean are corrupted by the too-much or the too-little. They are, however, perfected and preserved by the just Mean. This is easily demonstrated by facts, and Aristotle gives some luminous illustrations thereof. Thus, excessive bodily exercise of a violent kind and a lazy slackness in that respect alike weaken and destroy the health; while moderate exercise preserves it. So, also, overmuch eating and drinking sap the strength, and so does a meager and sparing diet; but moderation in these respects builds up the strength. The same principle holds of actions morally considered. To fear or to desire everything, on the one hand, and on the other to fear or desire nothing, are both blemishes of character; but prudent fear or absence of fear, and both of these ὡς δεῖ, that is, in the right manner, makes for perfection of character. Aristotle deals with this in *Nic. Eth.* ii, 2, §§ 10-15.

XI. The argument now moves on with an easy flow. According as a Virtue is generated from actions of this or that kind, so will the nature of the Virtue itself vary. Now a Virtue is generated from that kind of actions which occupy a Mean position, and therefore the principle and nature of Virtue will be the same and will occupy a Mean position. But here Aristotle warns us off the rocks as follows (*Nic. Eth.* ii, 7, § 7, onwards) : The Mean, says he, has two aspects, one as touching the thing, or Absolute, and the other πρὸς ἡμᾶς, as touching ourselves, or Relative. There is what he styles an Absolute Mean when it is equally distant from both extremes; and this is one and the same for everybody, and obeys, says he, an arithmetical proportion. Thus, if ten be much and two be few, six must be adopted as the Absolute Mean, for it is as much above the one number as it is below the other (§ 11). And he styles that a Relative Mean ὃ μήτε πλεονάζει, μήτε ἐλλείπει, which suffers from neither Excess nor Defect. This is not one and the same for everybody, as he shows by an apt illustration drawn from the olden custom of giving boxers a definite number of pounds' weight of food, neither more nor less, but just the amount which was moderate and suitable. Now this amount, the Mean, would not be the same for all boxers; for, supposing two pounds were too little and ten were too much, we could not say that six pounds is the right amount for each and every person who is practising in the gymnasium under a professional trainer. It would not be enough for Milo; it would be far too much for a novice. The Relative Mean, then, must be understood and viewed with σχέσις; that is, with qualifications, and those not of a simple kind. When we

say that a Virtue is begotten by actions which occupy a Mean position, we are speaking of a Relative Mean; and therefore the nature of this Virtue will be grounded in that Mean which takes into account the doer, aye, and all those separate circumstances of the action which can add morality thereto and enlarge and ennoble it. But on the other hand, the Absolute Mean would often result in a blemish. Thus, for example, the Relative Mean in a case of anger would be in different places according as the angry person was our father, or our judge, or our enemy. And, in a case of mourning, it would be in one place for the death of a husband or wife, and in another for the death of a neighbor; and in one place when a man was rejoicing over the booty gained, but in another when he was rejoicing over the victory won. " In regard of measure, then, every wise man avoids the too-much and the too-little; he seeks for and desires the Mean between these two—the Relative Mean, that is, not the Absolute Mean." So says Aristotle (passage cited).

XII. That Virtue is the product of actions which observe a Relative Mean, does not end the matter; but when it has thus been produced and completed, it goes on to produce like actions which observe the same Mean. And, as Vice is the offspring of actions which deviate from that Mean, so it in its turn can not but beget like actions, erring either by Excess or by Defect. Aristotle refers to this in *Nic. Eth.* ii, 2, § 15, as follows: " Not only do habits draw their origin and growth and decay from and out of the same things, but their energies or activities will also be found to issue in the same results." The illustrations which he gives of this can be read in the place named. It is elsewhere remarked of physical phenomena, Like produces like; and this holds good here, too. If, then, it is true not only that Virtue is engendered by actions which observe the Relative Mean, but also that it then engenders like actions, the nature of Virtue must needs lie in a like occupation of the Mean. The premise is sound, and therefore the conclusion is sound also.

XIII. Aristotle also uses another argument to prove the same thing, although I find little or no weight in it. If every Art performs its work in a perfect manner only when, in the execution thereof, it both sets a Mean before itself and holds to it, much more will Virtue be observant of the Mean in its labors and activities. The premise is true, and therefore the conclusion also. He justifies his arguing from the one thing to the other on the ground that Virtue is more refined and better than any Art. And he proves his premise by a well-worn method of argument: When any artisan's work is praised as a neat and workmanlike job, the praise usually carries with it the implication that the work is so knowingly and exactly done that nothing can be either taken away from or added to it without blemishing it, and what is therein praised is the Mean in craftsmanship; now this will be as much more praised in the operations of Virtue as Virtue is more excellent than any Art. (See *Nic. Eth.* ii, 6, § 15, onwards.)

XIV. After this proof that the movement of Actions and Emotions may on the one hand deviate now into Excess and now into Defect, and that it may on the other hand repose in the Mean, it becomes clear that a certain moral *ἐπίτασις καὶ ἄνεσις*, intensifying and slackening, takes place in them and that every man is required to adjust the degrees of that intensifying and slackening to Probity. This is to keep to the Relative Mean and to act *ὡς δεῖ*, as we ought, to observe *τὸ δέον* and *τὸ πρέπον*, what ought to be and what is befitting. Hence, after our Philosopher had inculcated the necessity of Virtue's observance of this Mean, he continued as follows (*Nic. Eth.* ii, 6, § 16, onwards): "I speak of that Virtue which relates to Morals. This is concerned with Emotions and Actions in which there is a too-much and a too-little and the Mean. Thus, any one can fear, trust, desire, hate, dislike, be angry, pity, or (to put it in one phrase) feel pleasure or pain, either too much or too little, and both improperly so. But to be moved by these affections at the right time and for the right cause and by the right objects, for the right motive and in the right manner—this is the Mean and the Ideal, and accords with Virtue. In the same way, there is a too-much and a too-little and the Mean in Actions."

XV. Now it is a very hard thing to keep to this Mean in all circumstances, yet this is the central point of Probity; and so the question arises, What will help us in attaining it, or by what means can we regulate the *ἐπίτασις* and *ἄνεσις*, the intensifying and the slackening, of affections and actions? I will answer it in one word: by Reason—not, however, any kind of Reason, but one that is perfect in its own Virtue and is such as the good and wise man employs; that is, what is commonly called Right Reason. For Practical Reason is made Right by the aid of Wisdom. Hence when Aristotle had begun, in *Nic. Eth.* ii, 2, to discuss how we are made Good, he says (§ 3): *τὸ μὲν οὖν κατὰ τ' ὀρθὸν λόγον πράττειν, κοινόν, καὶ ὑποκείσθω*, "That we must shape our conduct according to Right Reason (if one wishes to be good) is the common opinion, and we will assume it true." Now he made this assumption so as not to cause a breach in his method, and in order to expound the nature of Right Reason at full length in its proper place.

XVI. On this basis, also, rests the Aristotelian definition of Moral Virtue, which is given as follows in *Nic. Eth.* ii, 6, § 26: "Virtue is a trained habit of purpose consisting in the adoption of the Relative Mean in accordance with Right Reason, conformably to the standard of the wise man." [More accurately, in the Philosopher's own tongue, *ἔστιν ἄρα ἡ ἀρετὴ ἕξις προαιρετικὴ ἐν μεσότητι οὖσα τῇ πρὸς ἡμᾶς, ὡρισμένῃ λόγῳ, καὶ ὡς ἂν ὁ φρόνιμος ὁρίσειε.*] It is a Moral State. "For in the Soul three things exist: Emotions, Faculties, Moral States," says he, *Nic. Eth.* ii, 5, § 2. And as he had shown there that Moral Virtue is not mere Faculty nor Emotion, there was the third alternative left, that it is a Moral State;

for this Virtue is the Good of the Soul. The Moral State in question is προαιρετικός, proæretic, on account of those requisites which were explained above, in section VII; they are all implied in προαίρεσις, deliberate purpose. This Moral State consists in the observance of the Mean or in a Mean state—not, however, any Mean, but that Mean which is πρὸς ἡμᾶς, Relative. And what is that Relative Mean but the limit assigned by Reason, not, however, any kind of Reason, but that Reason which a Wise man employs? And so that Relative Mean is called the Mean of Reason. Hence, that observance of the Mean, in which Aristotle has summed up the nature and scope of Virtue, is nothing else than the *due regulation of actions and emotions, and all the details attendant on them, so as to attain the due end, this regulation being begun by and continued under the guidance of Wisdom.* (Add Cirellus, on the *Ethics* of Aristotle, pt. 2, ch. 5.)

XVII. In Book 2 of his *Nicomachæan Ethics* Aristotle indicated, in a word only, that the Good are not made so by Right Reason, and postponed a fuller explanation; so in Book 6, ch. 1, he takes up the discussion thereof:

" Since, as said above, the Mean must be chosen and not the too-much or the too-little, and the Mean is that which Right Reason has prescribed, let us discuss this more clearly. For in all the habits which I have mentioned, as in others also, there is a certain aim on which his gaze is fixed who has a part in Reason, and at one time he applies an intensifying effort, at another a relaxing. There is also a certain end associated with these Means which, as we have said, lie between the too-much and the too-little and are in conformity with Right Reason."

It is worth while to hear the Greek Paraphrast on this, through the medium of Heinsius' translation:

" In all the moral habits with which we have been dealing, as also in other activities and habits, there is a certain aim upon which he who is endowed with Right Reason and yields to its sway fixes his eyes; and he intensifies what is less than it ought to be and reduces what is too great, whether it be an emotion or an action or anything else that admits of being intensified or reduced. And there is, as it were, a certain rule and end whereby that Mean which Right Reason prescribes and which lies between Excess and Defect is recognizable. So those who would attain the knowledge of this Mean must needs have in view also the end and the rule. Now this is Right Reason."

Then Aristotle gives the whole of Book 6 to the explanation of the nature of Right Reason; that is, of Prudence. For ὀρθὸς λόγος, ὁ κατὰ φρόνησιν, " Right Reason is that which is in accord with Prudence." And ὀρθὸς λόγος περὶ τῶν τοιούτων ἡ φρόνησίς ἐστι, " Right Reason on such matters is Prudence." (*Nic. Eth.* vi, 13, §§ 17, 21.) And in much which Aristotle there sets forth about other Virtues of the mind, his especial

object is to bring out more clearly still the difference between Right Reason—that is, Prudence—and the other Dianoëtic Virtues. On this topic I have said much in the preceding dissertation.

XVIII. Aristotle, however, thought his task imperfectly accomplished if he stopped at a general demonstration of the Relative Mean as regards Virtue, and if he did not develop a special Διαγραφή, Table of the Virtues, about it, depicting not merely the individual Virtues which occupy the Mean but also the Vices or Extremes on either side thereof. For

Virtus est medium vitiorum et utrinque reductum.

(Virtue is a mean between vices, withheld from each extreme.)

"This must," says Aristotle (*Nic. Eth.* ii, 7, §§ 1, 2), "not merely be stated generally, but also in its application to individual instances. For a discussion on conduct which is limited to generalities is profitless"—the usual reading is λόγοι κενώτεροι, "over-empty" discussion, but the Greek Paraphrast gives κοινότεροι, "over-common"—"but that which goes into details and particular cases is sounder." Aristotle then devotes a whole chapter to this Διαγραφή, showing by individual instances the truth of his general proposition about Moral Virtue, namely, that it is an observance of the Mean which lies between Vicious Extremes. Many critics find faults in this detailed description, deeming it insufficiently congruent with the general thesis and not accurate in itself; and so poor Aristotle incurs a varied censure. And indeed, being but man, he was not ἄμεμπτος, blameless; yet I think that any emendation and reprehension would be better deserved in some other parts of his philosophy than here.

XIX. We will now, accordingly, scrutinize and weigh the objections in question, mindful, however, of that canon which our Philosopher lays down in *Nic. Eth.* i, 4, § 7: "It would not be worth while to review all opinions; it is better to select only the more important ones, especially those which seem founded in reason." So if, in our reply and ἀνάλυσις, or resolution of doubts, we can satisfactorily deal with Grotius (how great a man, indeed!), I think that the arguments, actual or possible, of others will collapse of their own accord or with a very slight impulse. During my execution of this undertaking, may no one be roused by zeal for Grotius to slander my task. For I am entitled to that freedom of discussion which all students of truth must ever maintain intact. And let any such person as I refer to understand also that I rate Grotius extremely highly, although he is liable to human errors. Philosophic discussions are not to be settled by a reference to the authority of great men, but by reasonings; what great men have thought may, however, be used as illustrative and confirmatory evidence. Nor let any one think that the view which I hold lacks its patrons. For Aris-

totle, when rightly understood, is a sufficient champion of his own cause. And among moderns I have one who is worth them all, the wise Melanchthon, who writes as follows in the Letter to Christianus Pontanus which is prefixed to his *Epitome of Moral Philosophy:* " Now Aristotle's *Ethics* must be cherished because Aristotle sees and grasps in unique manner the fact that Virtues are Observances of the Mean; and in the course of elucidating this he demonstrates with consummate learning that the movements of the Soul must be diverted and restrained so as to secure Moderation."

XX. Now Grotius, in the *Prolegomena* of his famous work *De jure belli ac pacis,* in the course of an attack on Aristotle, confesses that the first place in philosophy must be allowed to him, but complains that for some centuries last past that has been changed into a tyranny. And then he shows that this is especially true of Aristotle's doctrine of Moral Virtue, which Grotius calls μετριοπάθεια (Mean-affectioned-ness), the neat word by which Synesius describes Moral Virtue. We will give Grotius' own words, so as to help to a better judgment: " Among other things —if I may treat this, in passing, as not irrelevant to my purpose—it is, methinks, with good reason that some Platonists and early Christians part company with Aristotle when he asserts that the essence of Virtue lies in an observance of the Mean in Emotion and in Conduct."

XXI. As regards the Platonists, whichever of them Grotius refers to, if they have strictly followed the teachings of their master, they could not admit the Aristotelian doctrine about Virtue. For the invariable treatment of Happiness in Plato's writings is such as to make it clear to every one that what he has in his mind is almost always Theoretic Happiness. And, this being attained by its appropriate Virtues and actions, Plato has extended his enquiries so as to include the Moral Virtues and actions; and in various passages he expressly calls the Virtues Knowledge and the Vices Ignorance. I will not transcribe the passages but will simply refer to what I have written at the end of my dissertation *On the Knowledge and Ignorance of the Incontinent.*

XXII. Conspicuous among the early Christians who controverted Aristotle's teaching in this matter was Lactantius. In his *Divinæ institutiones* (bk. 6, ch. 16) he writes as follows:

" But I do not think even the Peripatetics are near the truth; they admit there are Vices but they would have them governed by moderation. Now even moderate vices must be shunned; nay, rather, the first thing to do is to get rid of them as vices. For nothing is a vice by nature, but it becomes one if we misuse our affections, while it becomes a virtue if we use them properly. It must next be pointed out that it is not the vices themselves, but their causes, which need moderation. We ought not, say the Peripatetics, to comport ourselves with excessive joy, but moderately and temperately, which is like saying that we ought not to

run hurriedly, but walk forward quietly. Why, a walker can miss the way, and a runner can keep it! And what if I give a case where it is a vice not merely to rejoice in moderation but even to rejoice at all, and another case where it is no vice even to rejoice with exultation? What good will the doctrine of the Mean be then? Well, I ask whether Aristotelians think a wise man ought to rejoice when he sees his enemy meet with a misfortune, or whether one ought to refrain one's joy when our State wins its freedom and safety by a victory over its enemies or by the downfall of a tyrant. There can be no doubt that in the former case to rejoice but slightly, and in the latter case to rejoice insufficiently, is gravely wrong. The same could be said of other affections. But, as I have remarked, it is the essential business of Wisdom to moderate not these but their causes; for they are set in motion from without, and there is really no obligation to put restraints on them, seeing that they may be gravely wrong even though small, and not wrong at all though very big. But what is necessary is to assign them to the proper times and circumstances and places, so that they are not vices at all, but things which may happen rightly. For as it is good to go right in walking, but bad to miss the way, so it is good to be driven right by one's affections, but bad to be driven wrong. Thus, even a vehement passion is innocent if it does not stray into the wrong bed, whereas a quite moderate passion which seeks other persons' beds is a most grievous offense. And so it is not a disease to be angry or to desire or to be stirred by passion, but it is a disease to be irascible, greedy or lustful. For an irascible man is angry where he ought not to be, and with the wrong person; and a greedy man desires what he does not need; and a lustful man pursues what the laws forbid. As, then, the onset of these affections can not and ought not to be prevented—they being necessarily implanted in us for the performance of our vital functions—all our efforts should be directed towards keeping them in the right road, where there is neither offense nor danger in the journey."

XXIII. It was, doubtless, to this Father with the lacteal duct that Grotius was referring, with approval of his opinion and dissent from Aristotle. Why this approval? I ask. Surely, if the passage just cited from Lactantius be compared with those cited previously from Aristotle, it will be found that what Lactantius reprobates never entered into Aristotle's mind, and that what Lactantius approves and recommends is in complete accord with the doctrine of the Mean! A man has no right to condemn another's opinions before he has thoroughly grasped what they are. Now here Lactantius clearly confuses the Absolute Mean with the Relative Mean. Never in any circumstance to rejoice at the happening of an ill is itself an error in Proportion, from the standpoint of the doctrine of the Mean. And where do the Peripatetics teach that Vices are to be tempered by an observance of the Mean?

And Seneca is equally unjust when he writes (*Epistle* 85): "The doctrine of the Mean is false and futile, and about as sensible as saying, 'I am unwell in moderation.' Of a truth, we are required to be mad in moderation!" And so is Cicero in the following passage, although he approves of the doctrine in question: "A man who exacts a penalty when in anger will never observe the Mean between the too-much and the too-little, which the Peripatetics desire. And in this desire they are right, provided they do not praise Anger and declare it a useful gift of Nature" (*De officiis,* bk. 1). Now this is really the opposite of Aristotle's teaching, and I do not hesitate to transcribe his own words on the matter, although the passage is rather long. It is in *Nic. Eth.* ii, 6, § 30, onwards):

"Not every action, indeed, and not every emotion admits of the Mean. There are things whose very name at once shows their vicious character, such as malevolence rejoicing in another's trouble, immodesty, jealousy; and in conduct, theft, adultery, murder. All these and the like disclose by their ordinary names that they are bad by nature, and not merely excesses or deficiencies. It never can be, therefore, that any of them should be well done; to do them is always a sin. There is no scope in connection with such things for doing them rightly or not rightly—as if one were to consider the proper degree and time and manner for adultery!—but, simply and absolutely, to do any of them is to sin. And indeed, to require a Mean condition or a Mean position in them would be like looking for the Mean and the Too-much and the Too-little in the commission of an assault, or in a lazy life, or in intemperance. For on that principle there would be a due measure and a Mean of the Excessive and Deficient, and Excess of the Excessive and Deficiency of the Deficient. But, just as there is not a Too-much nor a Too-little of Temperance and Bravery (for the Mean is here in a certain sense the Highest pitch), so there is neither Mean nor Too-much nor Too-little" as regards those actions and affections wherein moral badness is implicit, "but it is a sin to commit them in any degree. For there absolutely can not be a Mean for the Too-much or the Too-little, or too much or too little in the Mean."

What more can be required? Surely a critic of the lowest possible rank in questions of morals would tell Cicero that Anger must be distinguished from Rage, and an Emotion merely as such from an excess of that Emotion!

XXIV. Grotius continues: "This having been premised, Aristotle at once founded on it a doctrine which reduced contrary Virtues (say, for instance, Liberality and Thrift) to one and the same Virtue." Grotius, that is, with intent to show the absurdities which follow from a false hypothesis, begins by assuming that Aristotle has blended together two Virtues which are distinct in kind, namely, Liberality and

Thrift. If, however, we scrutinize the nature of Thrift, we find that it is no Moral Virtue at all, but simply a part of Economic Prudence. For Aristotle, in his *Rhetoric,* well shows that we grow rich not only by amassing wealth but also by timely diminution of charges and expenses; for Economic Prudence is concerned with three distinct functions, namely, the acquisition of wealth, the preservation of wealth when acquired, and the proper use of it when preserved. The second of these functions is sometimes called by the special name Thrift, just as the first is called in Aristotle (*Politics,* bk. 1), χρηματιστική, the Art of Money-making. So, also, Pliny (bk. ii, ch. 19) calls the bees *præparcæ,* that is, exceedingly thrifty, because of their painstaking care of their belongings. Our Philosopher, indeed, includes φειδωλούς, the thrifty, among the Avaricious (*Nic. Eth.* iv, 1, § 84); but there is no objection in this, because any one can behave himself thriftily and prudently in the care of his estate and also depart from that wise course under the impulse of a moral vice, such as Avarice. Meanwhile Thrift itself, or that part of what we call Prudence, is always good and praiseworthy, and the following are precepts thereof: Thrift is a big income; Buy, not what you can do with but what you can not do without; what is not wanted is dear at any price; Keeping what you have got is as meritorious as getting it.

XXV. Grotius says, further, "And he would assign to Truth two Opposites by no means equally related to the Mean, namely, Boasting and Dissimulation." To this criticism I answer that Truth can be considered either theoretically—according as our intellectual grasp, or διάνοια, agrees with things themselves—or practically. And in the latter case there is also a division into two parts; and in one part lies that Good Faith and Truth which is a part of Justice and is implicit in agreements and contracts. Truth is not considered by Aristotle (*Nic. Eth.* iv, 7) in either of these ways, as he himself (§ 15) expressly says. But to a certain extent what, for the purpose of distinction, is called Veracity by more modern Latin philosophers fills the gap, the sphere in which it discharges its duty being Conversation, ὁμιλία. It is that habit which leads us in familiar discourse to describe with candor what is in our minds or what has occurred. Those who make default as regards this Virtue are said to Lie. And we have instances of that default either when a man arrogantly vaunts his own affairs or slyly disparages them. In the first case we have what is properly called Arrogance; in the latter Dissimulation; the first kind of Falsehood erring by Excess and the latter by Defect. The Greek Paraphrast and the Scholiast happily concur at this point in saying that Aristotle classified the two kinds of Falsehood in the way I have stated. And here I should like to note, in passing, that Falsity is opposed to Speculative Truth, while the opposite of the Practical Truth which is implied in Justice and in agreements and con-

tracts is more correctly Falsehood, and the opposite to that Conversational (ὁμιλητική) Truth is the kind of Falsehood which is often Vanity, ματαιότης. (See place cited, § 20.) And when Aristotle in the same place says, "All Falsehood is disgraceful," his remark applies primarily to the chief kind of Falsehood, in such sort that in the other cases the αἰσχρότης, or disgrace, is less, and that when, in these cases, a man is said to be αἰσχρός, what is meant is ἀσχήμων, of discreditable behavior. (See § 22, same place.) For τὸ αἰσχρόν does not always mean what is by nature and in preëminent degree base, as is clear from a comparison of § 6 and § 19 of *Nic. Eth.* iii, 1. This, however, is not the place for any refined discussion of Falsehood and its varieties.

XXVI. There follows in the *Prolegomena* of Grotius: "And he has applied the name of Vice to some things which either are non-existent or are not essentially Vices, such as contempt of pleasure and of honors, and absence of anger with any man." Here Grotius charges Aristotle with classing among vices things which either are non-existent or are certainly not vices; and by way of examples he adduces ἀναισθησία (insensitiveness), μικροψυχία or ἀφιλοτιμία (lack of spirit or of desire for honor) and ἀοργησία (absence of angry feelings). I will deal with these one by one. Now, as regards the existence of these Extremes, they are accidentals and so can be found only in conjunction with their Subjects. And indeed, if you search the living and the dead, it will be hard to find any man in whom there was a complete ἀναισθησία or ἀοργησία. For even if such a man were found, he would be hardly a man at all, but a mere stock or trunk—that is, if he were insensible to absolutely all pleasure, even such as is lawful and necessary, or were irritated by no injuries. Aristotle himself confesses this (*Nic. Eth.* iii, 11, § 19, onwards; and iv, 5, § 9, onwards). As regards the third case, ἀφιλοτιμία, I think this is abundant among inferior and poor-spirited people. Although, then, these Vices are rare and perhaps in their complete shape are non-existent, yet Aristotle has demonstrated, by reference to principles and ἀποδείξεις, demonstrations, that Virtues lie in the Mean and Vices in the Extremes of Conduct; so that, albeit they have not all an existence actually tallying with the ideas of Science (for philosophers have a way ἀεροβατεῖν, that is, of walking in the air), yet Doctrine is right in dealing with them all on the footing of the highest actuality, and in defining Virtues and Vices in the abstract and not by reference to the concrete cases of Good and Bad people. "Whatever admits of rational and methodical discussion, is referable to the ultimate shape and instance of its kind," says Cicero, quite rightly, in his *De oratore.* To this may be added the extremely learned discourse of Philip Scherbius against Peter Ramus and his followers (*Philosophia Altorphina,* ch. 3, in my copy, p. 17).

XXVII. Now if I show that it is not unqualifiedly impossible, ἀδύνατον, that such Vices should at least in some degree exist in actual

subjects, I take it that I shall have satisfied Grotius. To ἀναισθησία, then, I refer what Galen, in his books on the Art of Medicine, writes in connection with Epicurus, namely, that reproductive activity is not conducive to health. It is a case of ἀναισθησία when Democritus (according to Pliny) condemned all sexual intercourse on the ground that one man would be issuing from another. It is a case of ἀναισθησία when one has castrated himself through dislike of the lawful act of reproduction and still is civilly considered a man. I pass by in silence those others who, under the influence of a kind of ἀναισθησία, have held wrong thoughts and speech about marital intercourse. It is a case of ἀναισθησία when lawful and necessary pleasures are shunned to the detriment of health. As to ἀοργησία, I imagine it hard to doubt that there are numerous cases of it—if not complete, at any rate partial—for history and practice supply an ample number of examples of that Slowness of disposition. A very familiar example is in the Old Testament, where we read how God Himself punished Eli, the priest, for this Vice. We have, then, so far settled one question, namely, that the mental affections mentioned do exist in their own manner and degree.

XXVIII. Now comes a second question. If they exist, they are either Virtues or Vices. That they must be ranked with the latter is clearly demonstrable by Aristotle's own method. For, as regards ἀναισθησία, though it be a less vice than Intemperance, it is none the less an actual vice. Nature has not implanted emotions and desires in us without an object, but in order that within limits and on fixed principles those advantages may arise which tend to the preservation of the individual or the propagation of the species. (On this point see *Nic. Eth.* iii, 11.) There is a fine passage in *Œconomics* i, 3, which fully deserves reading here: "Nature herself, by this process—he is speaking of the matrimonial (γαμητική) Union—secures the perpetuity of life, in kind undoubtedly, since it can not in number. And so both the male and the female sex are alike disposed by the Deity, working through a principle of nature, towards Union." With this end in view, man desires various pleasures. With this end in view he is also at times exasperated with anger and prepares weapons against the ills which threaten hurt or injury. So that they who, with the Stoics, would utterly uproot these affections of the mind, sin grievously against God, the Author of our nature. And although the more usual and more grievous sin is in the Excess of these affections, still there is sin also in the Deficiency thereof. The wise words of Gerhard Johann Voss (*Institutiones oratoriæ,* part 1, bk. 2, ch. 1, §2) deserve to be read here:

"The All-wise God has endowed our souls with affections, with the definite purpose that they should serve as aids to noble conduct. For, what the wind is to a ship, Affections are to us. Upon their due temper depends our tranquillity of soul, aye, and our happiness in this life.

They undoubtedly impel us to those things that Right Reason dictates. But if that same Reason suffer itself to be bludgeoned off the field, then they no longer lead to Virtue but to Vice, and become in truth diseases of the mind. This does not happen in the case of a wise man, for he, though not exempt from these affections, rules them. And so I put opposite that definition of the Stoics which says that *πάθος*, passion, is *ὁρμὴ πλεονάζουσα*, that is, an unmeasured and excessive onset, a well-deserved black Theta."

See also the other writers here cited by this erudite, *πολυμαθέστατος*, man. And let another Grotius now plead against them the cause of truth: " I am no follower of that School which forbids us to be moved by joys or sorrows. This doctrine is, in the first place, a slander on Nature, which has not only planted these affections in our souls but has also assigned to these affections certain bodily seats and instruments. And, in the next place, it does its best to disarm Divine Providence and to take away from (if one may so say) the great Charioteer of the universe both reins and whip, since it deadens us alike to His rewarding and to His chastising hand." (From *Epistle* 13, *ad Gallos.*)

XXIX. That *ἀφιλοτιμία* is also a vice I deduce as follows: A man who does not covet honors is likely to be backward in doing anything that deserves honors. And a man of such a disposition is either a man of vicious conduct, or near thereto. The reason of this conclusion is that Honors are the appropriate reward of Virtue, and are rendered only to the Good (*Nic. Eth.* iv, 3, § 30). I insist again that in this connection man must be considered as *φύσει ζῶον πολιτικόν*, an animal political by nature. For Christians are bidden to cultivate Humility and, if they attain it, are deemed to attain thereby the highest conceivable Good, seeing that their Master, who is beyond the reach of error, says, " Whoso humbleth himself shall be exalted."

XXX. Grotius pursues his theme with a new instance, which many deem incontrovertible: " That this foundation is not soundly laid as a universal Truth appears from the case of Justice. Aristotle, being unable to find, in Affections and the conduct consequent thereon, the requisite contrast of the Too-much and the Too-little, has found them both in the circumstances and things with which Justice is concerned. Now this, in the first place, is to make that transition from one genus to another, for which Aristotle deservedly blames others." In order rightly to resolve this doubt, we must state the position of the controversy with exactness. Grotius attacks Aristotle for making the nature of Virtue consist in an observance of the Mean in emotions and actions, and then, when dealing with the nature of Justice, requiring not the Relative Mean, *πρὸς ἡμᾶς*, but the Absolute Mean, and so committing *μετάθεσις εἰς ἄλλο γένος*, that is, a transition into a different genus. For, as appears from what was said above, Aristotle, when starting on his

enquiry into the nature of Justice, drew a well-marked distinction between the Reasonable Mean and the Absolute Mean; and, as there is a difference of genus between the two, it is possible to seem to have committed μετάθεσις εἰς ἄλλο γένος. And this criticism will not be met by showing that Justice is a Mean, but only by showing that it is a Reasonable Mean, in which the nature of all the Virtues consists.

XXXI. Now as regards Justice, it must be admitted that it is, in its nature and in its mode of operation, slightly different from the other Virtues. Let us now suppose, for the purpose of illustrating the present argument, that the goods of fortune are the external object of Justice. You will then be Just in regard of these if you keep an equal distance from Gain and from Loss, which will be the case if you neither unfairly take too much for yourself nor leave too little for the other party. Now as I exercise Justice in one and the same act, so also Injustice is exercised in one and the same act, a man taking too much for himself at the same time that he unfairly leaves or attributes too little to the other party. That is why Justice has as its opposite, not two vicious attitudes of mind, but only Injustice. What wonder, then, if an Absolute Mean is set up so far as concerns the external object, in our case the goods of fortune, and between the Too-much and the Too-little or the More and the Less, the Equal?

XXXII. But if you pay regard to the internal object of Justice, namely, the Lust of Getting, there is room here for the Reasonable Mean also. For, when the appetite which impels to seek the goods of fortune is regulated ὡς δεῖ, that is, in a fitting manner, it observes the Reasonable Mean. And when the Actions which are also objects here follow the lead of that kind of appetite and observe the same Reasonable Mean, they observe also the Absolute Mean. Grotius, then, is mistaken in his assertion that the Too-much and the Too-little have no place in connection with the affections and actions which subserve the manifestations of Justice. For the Reasonable Mean which exists in the realm of Affection and Action is not destroyed or extinguished by the Absolute Mean, nor *vice versa.* There is, then, no essential difference in this respect between Justice and the other Virtues, but its external object is of such a character that the Just man does not stand in the right relation to it unless he has produced that Equality in the goods of fortune which is the Mean between More and Less. To the extent, however, that the Appetites and the actions which arise from them or accompany them obey the moderating control of Prudence—to that extent, while making for the Absolute Mean, they observe the Reasonable Mean. If this be not conceded, then you are compelled to admit that the actions of a Just man are not intimately connected with the direction of Prudence, a thing which is clearly ἄτοπον, absurd. For the observance of the Reasonable Mean is nothing else than a wise moderation of the appetite, and in

moral actions, as was shown at some length above, in section XVI. Moreover, Aristotle himself admits that Justice is in consequence different from the other Virtues as regards the thing or the external object. (*Nic. Eth.* ii, 7, § 31; and v, 1, § 1.)

XXXIII. Grotius supplements the preceding argument by the following:

"In the second place, to accept less than one's own may be on extrinsic grounds a vice, because of what the individual, in the actual circumstances of the case, owes to himself and to his family; but it certainly can not conflict with Justice, for Justice is entirely founded upon doing no hurt to what is another's."

This pertains to the question, discussed in *Nic. Eth.* v, 9, Whether the man who gives too much or the man who receives too much does the wrong?—a question akin to the other which is discussed in the same place, Whether a man can do a wrong to himself? In order to understand this aright, a distinction must be drawn. For either, on the one hand, the giver is a judge or arbiter, or, on the other, he is a private person dividing something between himself and another party. If a judge wittingly gives too much to the other of goods not belonging to himself, he certainly does a wrong. But if a private person does this, when making a partition with another, he does not do a wrong, for a wrong can not be done to a consenting party; whatever a man without any compulsion deprives himself of in favor of another, he makes a gift of. Every one may give up as much as he likes of his own legal rights, without doing any wrong, unless wrong be incidentally caused thereby—as, for instance, where this surrender of his rights will make him a defaulter to those who have a prior claim on him; this is what Grotius calls "a Vice on extrinsic grounds." Besides, it is common for men of moderate and just dispositions to make voluntary concessions to others of what is within their legal right, and this through desire of praise. In so doing they make up for the pecuniary loss which they suffer by the greater good of praise and honor which they gain, and by the additional friends whom they make. (See Aristotle, place cited.) If, then, one without compulsion incurs a loss by giving more to the other party, this is not in direct conflict with Justice, because this is not in essence wrong-doing; but if this be done by a Judge, or if a man takes for himself against the wish of his partner, it is always wrong-doing and in conflict with Justice. So when Aristotle says that Wrong-doing produces alike the Too-much and the Too-little, or the More and the Less, he means Wrong-doing properly so-called, which can not occur where the one who receives the less is not unwilling.

XXXIV. Nor is Grotius' statement unconditionally true, that Justice entirely consists in abstention from an invasion of another's rights. For such abstention is not enough, but in addition it is requisite

that you should render to every man his own or his due—especially where there is the further obligation based on civil office, as where you are a Judge or hold a similar position. For such a person pronounces on the rights of litigants and awards now a thing to this man, and again some performance to the other man. And where an apportionment of property or of common burdens has to be made in accordance with Distributive (διανεμητική) Justice, the task is not discharged by abstention as regards other parties. And where there has been Wrong-doing and an inequality of goods has arisen in consequence, Justice will certainly require Reparation of the loss, and yet there will not at all have been an abstention as regards others.

XXXV. And then, as if Aristotle were quite crushed by these arguments, Grotius piles up the following:

"Similar to this hallucination is that which leads him to declare that adultery arising from lust, and manslaughter due to anger, are no concern of Justice, since the nature of Injustice is invariably the usurpation of another's right and it is immaterial whether this springs from avarice, or lust, or anger, or an unwise pity, or the lust of excelling, all of which are frequent causes of wrong-doing."

Here Grotius takes exception to two things. The first is Aristotle's assertion that adultery which arises from lust is not to be referred to Injustice. But that is really the case. Every action must be gauged by reference to its aim and end. If, then, a man commits adultery for the gratification of lust, procuring intercourse by the expenditure of large sums of money, he must not, as regards Private Injustice, be called Unjust ἑκτικῶς, that is, in his moral condition, but Intemperate. For even if the act which he does is unjust, ἄδικόν τι, still the end and aim of this act shows that it was deliberately linked to Intemperance, and so as regards Private Injustice the doer must be termed Intemperate rather than Unjust. But if a wanton woman solicits a man with the offer of a monetary bribe to commit a base adultery and he would not entertain her proposal were it not for the bribe, this man, in Aristotle's opinion, should be called Unjust as regards Private Injustice rather than Intemperate, his intent being directed rather to gain than to the gratification of lust—not that he does not commit an intemperate act, deserving of its own penalty, but that he can not be called Intemperate ἑκτικῶς, in moral condition, and naming should follow the more potent object of intent. All this is propounded by our Philosopher in order to draw the distinction between the Universal and the Particular varieties of Justice and Injustice; and if Grotius had but observed this, I can not think he would have found in it any reason for blaming Aristotle. To a certain extent it is true, as Grotius says, that the usurpation of another's right is an Injustice whether it spring from lust or anger or any other cause; but this is so only if Universal Injustice be meant, for, as regards Particular

Injustice, it is incorrect to call any one ἑκτικῶς, in moral condition, Unjust, unless πλεονεξία, that is, covetousness, be the characteristic of the doer's appetite.

XXXVI. For the topic of Manslaughter committed in anger, reference is made to *Nic. Eth.* v, 8, § 23, onwards. In that place Aristotle, after saying that some acts are ἑκούσια or done spontaneously, while others are perfectly προαιρετά, or due to deliberation, asserts that acts only make a man strictly and ἑκτικῶς (in moral condition) Unjust when he has done the wrong in question after deliberation and with full intent, and that in consequence those acts which originate in emotional impulses may indeed be ἁμαρτήματα, or offenses, but are not, strictly speaking, ἀδικήματα, or acts of Injustice; and so no one can be called ἑκτικῶς Unjust because of the commission of the latter. If, then, one has with malice aforethought killed another, he is Unjust in the strict sense, for the deed is ἀδίκημα, an Injustice (being what the jurists call guilty, *dolosum,* homicide). But if the deed was done in an outburst of rage, there is such a difference of manner and intent that the doer can not be called, by reason of it, ἑκτικῶς and evidently Unjust; the act is ἁμάρτημα, an offense (being what the jurists call faulty, *culposum,* homicide). What is done in the latter case is something unjust, but it is not done unjustly—that is, as the outcome of a deliberately planned Injustice—and so the perpetrator also can not be called Unjust after that fashion, namely, προαιρετικῶς, or deliberately. But on that showing, say some, a good deal of homicide will go unpunished with Aristotle's sanction? By no means; for even that kind of ἁμάρτημα, or offense, namely, faulty (*culposum*) homicide, will, sometimes at any rate, and according to the circumstances of the case, be visited with the utmost penalty, and Aristotle would raise no objection to this nor interpose any word on behalf of the manslayer. Where in Aristotle can anything be found in support of the other view?

XXXVII. When, however, he says that Injustice is nothing but the infringement of another's right, he seems θέσει δουλεύειν, to be the slave of his thesis. For, if Justice be wholly founded in abstention from such infringement, as he postulated a little earlier, it will of course follow from the contrary position that Injustice simply consists in such infringement. But as has been shown, the former proposition is not true when stated nakedly; and so the same holds of the latter proposition.

XXXVIII. After Grotius had laid it down that in the manslaughter which he was considering there is always Injustice, and that it did not matter whether the motive was avarice, or anger, or lust, or ambition, or anything else, he adds the following: "It is the peculiar quality of Justice to contemn all such motives as these, if for no other reason, then for the sole reason of preventing an outrage on human society." This passage shows clearly that he had not adverted to the

distinction which Aristotle drew between Universal and Particular Justice, but that he had confused the two. For the Justice by which human society is preserved is of course that which our Philosopher styles Universal, ὅλη ἀρετή; and this is impaired by any particular blemish or disproportionate emotion, such being ὅλη κακία, or Universal Injustice. (*Nic. Eth.* v, 1.)

XXXIX. Let us hear Grotius further. "To return," says he, "it is true of some Virtues that they moderate the emotions, but this does not mean that it is the especial and constant function of Virtues so to do, for Right Reason, which Virtue everywhere follows, in some cases dictates limits which we are to observe, and in other cases urges us to extremes." Here he is propounding his doctrine that we ought always to follow Right Reason, and that this at one time points us to the Mean and at another urges us to the Extreme. We have, above, heard Aristotle teach exactly the same doctrine; that notable passage of his, *Nic. Eth.* ii, 6, § 29, is relevant in this context, "Virtue, as regards its essence and principle, is that Mean which is indicated by whatever the circumstances of the case are; but as regards its excellence and perfection, it is the Extreme." Note here that this Virtue can be contrasted with Vice in two ways. First, as the Good is contrasted with the Bad: and in this connection Virtue is ἀκρότης, the Height, and so Plato—as interpreted by Apuleius (*De habitudine doctrinarum et nativitate Platonis philosophi*)—calls the Virtues, Heights. Secondly, each Virtue is contrasted with the corresponding Vice, as a Mean is contrasted with its Extremes; and in this connection Virtue is μεσότης, or observance of the Mean. As regards, then, its essence, wherein each Virtue differs from its extremes, it is μεσότης, while, as regards its excellence and perfection and goodness, it is ἀκρότης. And this virtuous observance of the Mean differs from Goodness as Cause differs from Effect. For in proportion as a man's deeds are exactly conformed to the Reasonable Mean, so will they be good. Accordingly Cicero says, in his *De officiis,* that the Mean is the best canon of conduct. (Add to the passage cited from Aristotle the commentary of the Greek Scholiast and of Petrus Vermilius Martyr, p. 289.)

XL. In support of his foregoing proposition about Virtue, Grotius relies on certain illustrations. We can not," says he, "worship God in excess, for the sin of Superstition does not lie in excessive but in perverse worship." Now Aristotle laid down the very same thing; for there is no Too-much or Too-little in the Mean, and so we can not be over-pious or over-just or over-temperate, and so on. Now as regards the specific instance of Piety, I agree that there is some foundation for denying that the corresponding Vice of Excess is Superstition; and of Defect, Impiety; for Superstition is itself a kind of Impiety. Impiety, then, is the only antithesis to Piety; and I can easily show why, if you

pay sufficient regard to the proper quality of the Virtue of Piety, for the usage of language amply testifies to the number of duties which it embraces. It is as regards God that we are primarily called pious, and next as regards those human beings to whom we owe most because we have received most from them, Parents, Fatherland, and others of that kind. Let us take its primary meaning, whereby we are called pious towards God. This Piety embraces all worship, love, reverence, respect, devotion, and every duty which moves from man, according to his little measure, towards God. Next, it must be noted that there is a kind of Society existing between God and man. Cicero says (*Laws,* bk. 1): "The primary Society is that of man with God, the second that of man with man." Consequently Piety is not a simple variety of Virtue, but one which preserves by every kind of duty that Society which subsists between God and men. It is therefore a pious thing to fight bravely and to encounter death, if that befall one, on behalf of one's altars and religion. It is a pious thing, out of love of God and respect for His commandments, to abstain from unlawful pleasures, to cultivate temperance and justice, to do what is honest and flee from what is base. It is a pious thing to refer all the actions of one's life primarily to the glory of God. Accordingly, just as Universal Injustice is contrasted with Universal Justice, which preserves Civil Society and binds it together with a common bond, so the only thing which is rightly opposed to Piety, the common link of that Society which subsists between God and men, is Impiety. Verily I fear that Grotius has fallen into precisely the same *παράβασις*, or transgression, that he blames in Aristotle. For Piety in that Society which subsists between man and God is not the civil Virtue of which alone the Philosopher asserts that it consists in observance of the Mean.

XLI. But you may retort that Universal Justice also was placed by Aristotle between two Extremes. He teaches (*Nic. Eth.* v, 1) that Universal Justice is in essence identical with Moral Virtue, but differs from it *τῷ λόγῳ*, verbally. This Justice, therefore, when considered in its essential parts, holds of course a Reasonable Mean, that is to say, in the specific instances of Moral Virtues. But in so far as it always has *σχέσις πρὸς ἕτερον,* that is, a bearing on others with whom life in Civil Society is lived, and directs all its functions towards the common weal of this Society, it is treated as a Good which conserves that Society and its members. And Universal Injustice is then to be treated, on the contrary, as an Evil which destroys that Society and hurts its members in various ways. In such a *σχέσις*, or relation, then, just as Virtue and Vice are each opposed to the other, so Universal Justice, as the common Good of Civil Society, is opposed simply to Universal Injustice as the common Evil of the same Society; and on the same analogy, Impiety is rightly taken as the sole opposite of Piety.

XLII. And Grotius has a series of other criticisms, such as, " We also can not have in excess the desire of Eternal Good, or the fear of Eternal Ill, or the hate of Sin." This is easily parried by the use of the foregoing arguments. For a limitless desire of Eternal Good, and a limitless fear of Eternal Ill, and a limitless hate of Sin already occupy the Mean position as regards Reason, it being in entire harmony with Right Reason that such should be our attitude in these matters. We simply can not err in Excess here. Why? Because, as Aristotle himself says (*Nic. Eth.* ii, 6, at end), " The Mean has no Too-much or Too-little." In the same way Grotius' next remark leaves Aristotle scatheless: " It is therefore a true saying of Gellius that there are certain things which admit of no bounds in point of extent, and which are even more praiseworthy the larger and ampler they are." The only comment that is worth making here is that this opinion of Gellius' applies both to the Speculative and to the Moral Virtues, so far as these latter are regulated by the stringent rule of the Relative Mean.

XLIII. Grotius concludes his adverse criticism of Aristotle's doctrine of the Mean, *μετριοπάθεια*, by quoting and adopting a passage from Lactantius. This is the passage already set out. It contains a fundamental error which prevented the shackled mind of Lactantius from rightly appreciating this doctrine. I postponed the exposure of this error at the earlier stage; but as Grotius has guided us thither, let us do justice to his words. They are:

" After a long dissertation on the affections of the mind, Lactantius says that the function of Prudence is not to deal with the moderation of these but of their causes, they being induced from without and the imposition of restraints upon them not being an absolute duty, since they may be but slight in the greatest of crimes and very intense without any crime at all. We propose to do honor to Aristotle, but with the same liberty that he, in his zeal for truth, has displayed towards his own masters."

Now as regards Lactantius' assertion that Prudence is not concerned with the regulation of the affections of the mind but of their objects, it is entirely false; for these same affections need the restraining curb of Reason in order to prevent excess on their part with regard to external objects. Thus, for example, Prudence does not consist in the moderation of wine or sexual activity, but in the moderation of the desire for wine or sexual activity, which can be felt either in moderation or immoderately.

XLIV. Here, then, we have the criticisms which Grotius thought capable of assaulting and destroying Aristotle's doctrine of the Mean; if there be any one whom they have induced to quit our Philosopher's side, I would that he may with calm and wise judgment weigh against them the arguments and answers which I have set forth. I am well

aware both that there are other views concerning Moral Virtue held by other speculators and that other criticisms still are directed against Aristotle's doctrine. But those are the chief ones which I have, I think, just settled, and so I will not waste time over the solving of other superfluous and trifling doubts. It remains to say briefly that the doctrine of Moral Virtue which the Stoics have bequeathed to us is utterly absurd and impious, and seemingly designed to repress and uproot all activity of the passions: they do not speak of it as *εὐπάθεια* that is, Happiness; or as *μετριοπάθεια,* that is, the Mean; but as *ἀπάθεια* and *ἠρεμία,* that is, Insensitiveness and Tranquillity. I have mentioned and repudiated this error above, in section XXVIII, and there is no need of any prolix refutation. Indeed, that has befallen the Stoics which befell a certain Thracian. This man knew nothing about agriculture; and when he saw his neighbor clearing his olive-yards and vineyards and stubbing up the young brambles there, he lopped and hewed down his own olives and vines as well as all the brushwood. That is the neat apologue which Herodes Atticus used long ago in order to give a good castigation to the Stoic doctrine of Apathy. It can be read in full in Gellius, *Noctes Atticæ,* bk. 19, c. 12.

XLV. I should like to point out that this doctrine had been promulgated long before the Stoics (for the time of the Stoics, who were founded by Zeno of Citium, was long after Aristotle), either in or before Aristotle's day. For he discourses as follows in *Nic. Eth.* ii, 3, § 10: "Some define the Virtues as immunities from disturbance, as tranquil states of mind, that is, *ἀπάθειαί τινες καὶ ἠρεμίαι.* Their mistake lies in postulating this simply and absolutely, and in ignoring the true point in their estimation of this *ἀπάθεια* and *ἠρεμία,* namely the How and the When and the other usual details of circumstance." It is not likely that this doctrine emanated from the Academy, seeing that Plato rejects it in many passages; and although the Stoics held these views, they can not without error be taken as pointed at here; for, as I have said, they were much later than Aristotle. Plutarch, however, gave them a thorough refutation in his book *On Moral Virtue.* Anyhow, one may see the absolute truth of Cicero's saying (*De natura deorum,* bk. 1), "The death of men does not involve the death of their opinions." Still, it is strange that even most learned Fathers of the Church, Gregory Nazianzen, Basil, Augustine, and others, lured on, doubtless, by the specious sobriety of the Stoic doctrine, should have lapsed into the same error. In just the same way those Fathers were often divided by the grave dissension which sprang up between the Academics and the Peripatetics. About this one may consult the three books of Georgius Trapezuntius, published at Venice, A. D. 1523, in which, after a comparison of the two philosophers, he maintains that Aristotle is much to be preferred to Plato. Cardinal Bessarion, of Nicæa, took up Trapezuntius' challenge on Plato's behalf.

XLVI. We are now able to deduce from what has been said, that whoever will adopt and adhere to this golden rule of the Mean will find in it at the same time Probity's self, τὸ δέον and τὸ πρέπον, the Right and the Fitting—for you will realize that all these words are used by Aristotle and others in almost the same meaning—seeing that, just as in ordinary matters there is nothing nicer or more seemly than Order, and in Music nothing sweeter than Harmony, so, when a man consistently behaves in such a way that each and every detail of his conduct is conformable with Probity, and this Honest conduct is done honestly, he is said to have attained the Aristotelian Mean, and therewith Moral Goodness. That Mean, however, is not like a mathematical point or center, but has, rather, continuous length and breadth, in such sort that one who chances to deviate a little from the crest-line of the Right and Good, and has not adjusted all and every detail of conduct with most exquisite precision, may none the less be still a Good and Honest man. Now, just as by this Mean the human soul is instructed and perfected in the performance of the works of Virtue, so also it recognizes that it is obliged thereby to a certain kind of conduct towards other persons; and this obligation the Good and Wise man primarily recognizes God-ward, rendering to Him a dutiful Piety, while towards man he displays Justice by performing all the duties of Virtue in accordance with Natural Law.

XLVII. Robert Sharrock, therefore, is overmuch pleased with himself when he finds fault with the Aristotelian Mean in more respects than one. In the course of the Philosopher's demonstration that the nature of Virtue lies in the Mean, he defines—says Sharrock—the unknown by the equally unknown, and entirely omits to show what the prescriptions of Reason are, and what the Relative Mean is, and what the determinations of a Wise man are. The description of Virtue wherewith Aristotle contents himself is, says he, of such a sort as if a traveller who asks the way from Rome to Brundusium is told to follow that which the wisest travellers have thought the best one, going not too much to the right nor too much to the left, but just where Reason bids. And, he adds, there is nowhere in the writings of Aristotle any clear exposition of the meaning of that resonant and oft-repeated word Ought. To this verbal child's play I will only make a brief rejoinder. In the first place the Philosopher's design was to set forth his theory of Morals ἐπιστημονικῶς, that is, in a scientific manner; accordingly he dealt throughout with universal propositions, and the scheme of his work did not allow him to descend too much to singular propositions (and so gratify Sharrock!). That those who propose to live according to Virtue should place the Honest before themselves as a goal, he does not anywhere teach; but he says that that goal may be reached by the observance of the Relative Mean and by shaping all the details of conduct in that direction, and that Probity's self and the Relative Mean

are pointed out and defined, with account taken of the varying kinds of conduct, by Right Reason. And this Right Reason, says he, is such as the Ideal Wise man employs, and under the guidance of which he directs *προαίρεσις*, that is, his deliberate purpose, and his conduct towards the goal named, and which, in accordance with the Laws of Nature (included by Aristotle within Universal Justice), he seeks for and uses as his rule, demanding it as *δέον*, a necessity, in order to meet the obligation of those Laws. And hereby a man is rendered so much more capable of correctly discovering and testing this Mean or Probity of conduct and the duties of Piety and Justice which the Natural Laws, as promulged by Wisdom, demand, that, in the issue, that Wisdom is gradually enlarged and there is added unto it an improvement in Tone of mind, in Doctrine and in Habituation. The improvement in regard of the first of these will give additional distinctness and volume and clearness to the promulgation of the Natural Laws, and the improvement in regard of the two latter will rouse and set in operation a readier assent thereto and an obedience freer from rival claims.

Of a Good Disposition, Περὶ Εὐφυΐας.

I. This second Excursus, like the first, should be of no small utility in obtaining a fuller and more exact knowledge of the Law of Nature, and I should have made both of them integral and consecutive parts of my dissertation on the Law of Nature had I not thought that a separate treatment would be clearer and that it would be more convenient to explain, all together, such of the individual topics as relate thereto. I have more than once insisted that all Natural Law is either General or Special. The latter serves to cement and conserve special societies, while the former is common to all societies, dealing, so far as its positive injunctions are concerned, with the obligations of Virtue which are due in varying degrees and kinds, and, so far as its negative injunctions are concerned, with the prohibition of every kind of Vice. In order that the obligations of Virtue may, in accordance with the positive injunctions of the Natural Laws, be performed, and that Vices may, in accordance with the negative injunctions of the same, be shunned, there exist corresponding Laws of Nature, so that the Law of Nature differs from Virtue, not in matter but only in the different point of view. I have treated of this distinction at some length in my *Dissertation on Universal Justice*.

II. The connection between Natural Law and Justice being, then, so close, the exposition of the latter will be very helpful to the better understanding of the former. Now, I said that there are three contributory causes of Moral Virtue, namely, Nature, Teaching and Habituation, and so it is of considerable importance to learn what the distinguishing mark of each of these is, especially as this is somewhat obscure in the case of Nature. Meanwhile each furthers the promulgation of the Law of Nature and aids in procuring the assent and obedience which are due to it, just in proportion as it contributes to the production of Moral Virtue in individuals.

III. Accordingly it is thoroughly worth while to devote some diligence to an enquiry into the part taken by Nature, considered separately from other principles and causes, in securing Virtue and Civil Happiness. Our best endeavors will be given to the prosecution of this enquiry, in order to give better and better illustrations of what has preceded and to attain a fuller knowledge of the same. *Γίνεσθαι ἀγαθοὺς οἴονται, οἱ μὲν φύσει, οἱ γὲ ἔθει, οἱ γὲ διδαχῇ*, " It is deemed that the Good become so, some by Nature, others by Habituation, and others by Teaching," says Aristotle (*Nic. Eth.* x, last ch., § 12). And he repeats and

enlarges on this in *Politics* vii, 13, p. 479; and 15, p. 491. And how much is to be attributed to each of these, that is, to Nature, to Habituation and to Teaching, he expounds not only in the passages cited but also in *Nic. Eth.* ii, 1, § 3, where he says, "The Moral Virtues are obtained *ἐξ ἔθους*, that is, from Habit, wherefrom they also derive their name."* And shortly thereafter (§ 4) he arrives at the following conclusion: That no Moral Virtue is implanted in us by Nature. The important share taken by Habituation in the development of these Virtues is also pointed to in *Nic. Eth.* i, 7, § 56, where he traces to *ἐθισμός* (Habituation) the knowedge of the Principles of Conduct and the assent which follows on that knowledge. And he accordingly concludes as follows (*Nic. Eth.* ii, 1, last §): *Οὐ μικρὸν οὖν Διαφέρει τὸ οὕτως εὐθὺς ἐκ νέων ἐθίζεσθαι, ἀλλὰ πάμπολυ· μᾶλλον δὲ τὸ πᾶν,* "It is therefore no small matter, but an important one—aye, all-important—whether in our early years we acquire this or that habit." Since, then, he ascribes this predominant influence to Habituation, we must allow that it is the most potent and effective of the causes which contribute to the result under consideration. And what sphere must we, in consequence, assign to Nature and Teaching? The Greek Paraphrast gives a brief answer to this question (*Nic. Eth.* ii, 1): *ἡ μὲν φύσις ἐκεῖνο δίδωσι μόνον τὸ δύνασθαι σπουδαίους γενέσθαι. ἡ δὲ διδασκαλία, γινώσκειν ὃ τὸ δέον γενέσθαι. τὸ γὲ καὶ ἐνεργείᾳ ἤδη γενέσθαι σπουδαίους, μόνον τὸ ἔθος παρέχεται.* "The sole gift of Nature is the capacity to become good; from Teaching one learns the obligation to be good. But Habit can alone secure that one, furthermore, actually is good." And the Greek Commentator (a man out of the common, whoever he was, whether Eustratius or Aspasius or another) makes this clear in the same place, saying:

"The Moral Virtues originate and grow, for the most part, by Habit. For if men habitually associate with intemperate persons, they become intemperate, and those who associate with just or brave persons become themselves just and brave. Nevertheless Prudence and the Right Reason thereof undoubtedly complete these Virtues; and a proof that their existence depends in the most intimate manner upon Habituation is furnished by the fact that there are many folk who, despite a knowledge of Right Reason, are so much under the sway of Pleasures or Pains as to be incapable of good conduct, and the cause of this is that they have not habituated themselves to good conduct."

IV. However, it is now abundantly clear what share is to be attributed to Habituation, and I have dealt with the topic elsewhere; so let us briefly consider what is to be attributed to Teaching and Instruction. There is extant in Marsilius' edition of Plato, and also in Stobæus, a dialogue, considered genuine, *περὶ Ἀρετῆς εἰ διδακτόν*, *Of Virtue and*

* Aristotle here assumes that there is an etymological connection between *ěthos* (Habit) and *ēthos* (Character).—TRANSLATOR.

whether it is Teachable. In it Socrates moves along a line of induction to the proof that, if Virtue could be learned, it must be learned from good men. And then he shows, by the cases of Thucydides, Themistocles, Aristides, and Pericles, all exceedingly good men, that Virtue is not taught by good men, inasmuch as these men had neither good teachers nor good disciples or sons even; so that either Virtue can not be taught or they begrudged teaching it. But that it would be absurd to attribute so disfiguring a blemish to such men he deduces from the fact that they are not like those other craftsmen to whom Hesiod's saying applies, *καὶ κεραμεὺς κεραμεῖ φθονέει καὶ τέκτονι τέκτων*, "Potter envies potter and smith envies smith." On the contrary, it was all to the good that they should be surrounded by many like themselves, which would be disastrous to craftsmen. And he continues, Since, then, Virtue can not be taught, it must either be a gift of Nature to us or come in some other way. But that Nature is not the author of that good, he shows by the fact that in the case of things it is by the exercise of skill that we get to know whether any of them is good or bad, as whether a horse or a dog is sound or faulty, but we employ no art in detecting whether a man is good or bad. The inference is that Virtue is breathed into the good in some ineffable manner and by a Divine afflatus. If this were really the teaching of Socrates, it would be a fair objection to ask why, then, he asserted Virtue to be Knowledge, seeing that Knowledge can only be acquired by Teaching. In this connection Aristotle says (*Nic. Eth.* ii, 1, § 2) that the Dianoëtic Virtues, among which Knowledge is ranged, are largely derived from Teaching; and in his *Magna Moralia* (i, 1) and his *Nic. Eth.* (vi, 13, § 15) he may be found calling Virtue Knowledge or Wisdom; and in Plato's *Meno* (p. 19 and elsewhere) there is a lengthy discussion of the topic. But to any such criticism the rejoinder is easy that Socrates does not reckon as Virtue those forms of Knowledge which are solely concerned with Necessary Truths. This is shown by several passages in Plato's *Laws,* and in the *Protagoras* Socrates discourses as follows:

"Since our life's welfare undoubtedly lies in the right choice of Pleasure and Pain—that is, in the selection between more and fewer, greater and less, nearer and more remote—is there not, to begin with, a faculty of measuring excess and deficiency and the mean between the two?"

PRO. "It must be so."

SOC. "Now if there is a faculty of measurement, there must be a corresponding art and science?"

PRO. "Agreed."

SOC. "Well, we will consider elsewhere wherein especially this science consists," etc.

A little later he says, "An erring act, unregulated by Knowledge, is, as you, too, perceive, a result of ignorance."

But let us leave these doctrines of Plato, in order to hear what our Master says (*Nic. Eth.* x, last ch., §§ 14, 15):

"Reason and Teaching are, perhaps, not strong enough to cause virtuous conduct; a prior requisite is that the hearer's soul should have been trained by Habit in the right appreciation of Pleasure and Pain, just as the soil of the earth must be fitted to bear crops by a previous tilling of the right kind. For one who is swayed by his affections will never give an attentive ear to exhortations against vice nor understand the proper force of principles and precepts."

And Aristotle has a similar remark (*Nic. Eth.* i, 4) about the student of Political Science. Cicero, too, employs the same reasoning (*Tusculan Questions,* bk. 3).

V. Let us pass on to our proposition, namely What, and what kind of, contribution Nature makes. In the *Politics* (vii, 13) we are taught on this subject: *φῦναι δεῖ πρῶτον, οἷον, ἄνθρωπον, ἀλλὰ μὴ τῶν ἄλλων τι ζώων. εἶτα, καὶ ποῖόν τινα τὸ σῶμα καὶ τὴν ψυχήν,* which Victorius translated: *Primum oportet nasci, veluti hominem, et non aliud quodpiam animal: deinde qualem corpore et animo.* "The first requisite is birth, to wit, a man and no other sort of animal; and then the important question is, with what kind of body and mind." From Nature, then, comes a disposition fit to imbibe Virtue and understand the Laws of Nature. For as, in the words of Thomas Aquinas on this topic, what is received into another thing is received according to the capacity of that thing, so is it here, too, just as it is in the arts. If the substance which is worked on is of the best possible kind, the art produces the best possible result on it; and so also a man's nature which has been well wrought is best adapted for assimilating Virtue and the discipline of Natural Law. Now how does a man attain such a disposition? By being born so endowed with Reason, says Aristotle, that he does not view everything with the torpor of the brutes, but with an alertness addressed towards the true end of human life; for the absence of Reason deprives the brutes altogether of the capacity for Virtue and Laws and true happiness. And if any men be of so distorted and base a character as to become like brutes towards all that is upright, they must, says Aristotle, be classed as if they were brutes; and he calls them *πεπηρωμένους πρὸς ἀρετήν,* "incapacitated for Virtue." (*Nic. Eth.* i, 9, § 6.) Cicero declares that such men—aye, and men of an irresponsive type also—are ill-fitted for the reception of Virtue (*Tusculan Questions* 5). And Hippocrates, in his *Nomos,* says, *πρῶτον μὲν οὖν πάντων δεῖ φύσεως. φύσεως γὲ ἀντιπραττούσης, κενεὰ πάντα,* "The primary requirement is the coöperation of Nature; if Nature act counter, all is in vain." And in addition there must also be a certain endowment of body, so that the quality first named may be strongly rooted, and *εὐαρμόστως καὶ ἐπιτηδείως,* harmoniously and fitly, ordered for the performance of the duties of Virtue and the operations of the soul.

VI. Such a Nature as this Aristotle elsewhere calls εὐφυΐα, a Good Disposition, and a man who is honored by Nature with this boon is rightly called εὐφυής, of a good disposition. And although the Athenians used the word εὐφυής in a special sense of ὁ εὐτράπελος καὶ σκώπτειν δυνάμενος, the man who is witty and able to say amusing things, as Isocrates testifies in his *Areopagiticus,* yet here it clearly takes a different shade of meaning, to indicate one by Nature skilful in attaining some desirable end and endowed with a natural dexterity of intellect therefor, and of good abilities and parts; so that εὐφυΐα does also come to mean an innate dexterity and good natural parts. Aristotle also employs the word in more than one signification; indeed in *Rhetoric* iii, 10, pr., he says that wit and pleasantness are qualities of one who is εὐφυής, or they may be the result of much practice. In *Rhetoric* i, 6, he uses the word in a more general sense, conjoining εὐφυΐα, μνῆμαι (Memory), εὐμάθεια (Receptiveness), and ἀγχίνοια (Alertness). In the *Poetics* he also says that ability to write verse is a quality of the εὐφυής, and in the same place he declares it a mark and proof of εὐφυΐα to know the proper use of metaphor and to abound therein. Galen, too (*De usu partium,* bk. 1, ch. 9), makes εὐφυΐα a quality of the body, but this is a very rare use of the word; he labels as εὐφυΐα and κάλλος (Beauty) the best conformation of the organs and limbs, together with the appropriate use of the same.

VII. Now any estimate of the Nature of man is based on his rational soul; and, inasmuch as εὐφυΐα is undoubtedly a part of that soul, the question what faculty thereof it pertains to deserves attention. We know from *Nic. Eth.* i, last ch., that the especial faculties of the soul are Διανοητική and ὀρεκτική, the Intellectual and the Appetitive. The sphere of the latter is in the irrational part of the soul, τὸ θυμοειδὲς καὶ τὸ ἐπιθυμητικόν, words which Tertullian, in his book *De anima,* rendered by "Indignativum" and "Concupiscentivum." And in the last part of *Topica* (viii, 14, Pacius' (?) edition) Aristotle, after laying down rules for acquiring the dialectic faculty, continues his discourse as follows: δεῖ δὲ πρὸς τὸ τοιοῦτον ὑπάρχειν εὐφυΐα. καὶ τοῦτ' ἔστιν ἡ κατ' ἀλήθειαν εὐφυΐα, τὸ δύνασθαι καλῶς ἑλέσθαι τἀληθές, καὶ φυγεῖν τὸ ψεῦδος. ὅπερ οἱ πεφυκότες εὖ, δύνανται ποιεῖν εὖ. οἱ γὲ (some, including J. Schegkius, read εὖ γὲ) φιλοῦντες καὶ μισοῦντες τὸ προσφερόμενον, εὐκρινοῦσι τὸ βέλτιστον. That is to say, "But to produce this effect a good disposition is a fundamental requisite. Now the true εὐφυΐα is this, to be able rightly to choose what is true and reject what is false. This they can well do who are well equipped by Nature. And they who aright love and hate what is brought before them, discern what is best."

VIII. There is in *Nic. Eth.* iii, 5, §§ 41, 42, an admirable passage commendatory of the same theme.

"[* But if not, . . .] the aspiration after the [true] end will not be a matter of our own choice, and it will be necessary for a man to

* Translation by Welldon, London, 1892, p. 77.

be born with a sort of moral vision, enabling him to form a noble judgment and to choose that which is truly good. He who naturally possesses this noble judgment (εὐφυής) will be Nature's noble; for he will possess the greatest and noblest of all gifts, the gift which can never be received or learnt from anybody else, but must always be kept as Nature herself gave it. To possess this natural gift in nature and honour is to have a perfect and sincere nobility of nature."

And in *Magna Moralia*, bk. 1, Aristotle discourses as follows:

" Some one may say, If it is implanted in me to be just and upright, I shall be the best of all, should I wish it. By no means. Why? Because that can not happen even in the case of the body. Not even if a man is willing to bestow pains on his body, will he at once have his body in the best possible condition; something more than the bestowal of pains is necessary, namely, Nature's gift of a fine, good body. He can improve his body, but all the same he can not make it the best of all. ὁμοίως δὲ δεῖ ὑπολαμβάνειν καὶ ἐπὶ τῆς ψυχῆς. οὐ γὲ προαιρούμενος εἶναι σπουδαιότατος, ἂν μὴ ἡ φύσις ὑπάρχῃ"; that is, " The same thing holds good of a man's soul: it will not at his wish become supremely good, unless it is so by nature; but it will certainly be improved."

IX. Now while we find some few utterances of Aristotle and other ancients about εὐφυΐα, let us see whether we can find anything by Aristotle's master, Plato, which will throw a little light on this sufficiently obscure topic. In the *Letters* (7, p. 719) *to the Kinsmen and Friends of Dion,* he writes as follows:

" To cover all that ground, moving hither and thither and up and down towards each and every object, is scarcely the way to attain in the end a sound inner knowledge, knowledge (I mean) of the naturally good things (εὖ πεφυκότα) that are in a soul which is by nature well-disposed (εὖ πεφυκώς) to those same things. But if a man be evil-disposed by nature—and this is the moral condition of many both as regards the objects of knowledge and as regards their own evil character—not even Lynceus could give vision to a soul of that kind. In a word, neither quickness of wit nor a good memory will ever bring the object in question within the ken of one who is not already akin to it by nature. For it can not take its rise in alien moral conditions. And so they, on the one hand, who are not naturally fitted for, and akin to, προσφυεῖς καὶ συγγενεῖς, Justice and other things of good report, albeit they are of sound intelligence and memory, some in some matters and others in others, and, on the other hand, they who are akin thereto but are dull of wit, and of defective memory, will never attain the summits of true learning, whether about virtue or about vice."

In his *Republic* (bk. 3) Plato * asks who is the good judge, and answers that he should not be young but should have learned to know

* Here I follow the translation of the original Greek by Jowett, Oxford, third edition, 1908, pp. 408-409.—TRANSLATOR.

evil, not from his own soul, but from late and long observation of the nature of evil in others; knowledge should be his guide, not personal experience. And a little later on he continues, " Then the good and wise judge whom we are seeking is not this man (*namely, the bad man whom Plato has just been speaking of*) but the other. For vice can not know virtue too; but a virtuous nature, educated by time (ἀρετὴ δὲ φύσεως παιδουμένης Χρόνῳ), will acquire a knowledge both of virtue and of vice." And then he adds, " This is the sort of medicine, and this is the sort of Law, which you will sanction in your State. They will minister to better natures, εὐφυεῖς, giving health both of soul and of body; but those who are diseased in their bodies, they will leave to die; and as to the corrupt and incurable souls, τοὺς κατὰ ψυχὴν κακοφυεῖς καὶ ἀνιάτους, they will put an end to themselves."

In *Republic* v, my copy 458, Plato discourses thus: 'Απόκρινον, ἆρα οὗτως ἔλεγες, τὸν μέν, εὐφυῆ πρός τι εἶναι, τὸν δέ, ἀφυῆ, ἐν ᾧ μὲν ῥᾳδίως τι μανθάνοι, ὁ δέ, χαλεπῶς; καὶ ὁ μέν, ἀπὸ βραχείας μαθήσεως τυχὼν καὶ μελέτης, μηδ' ἃ ἔμαθε σώζοιτο; καὶ τῷ μὲν τὰ τοῦ σώματος ἱκανῶς ὑπηρετοῖ τῇ Διανοίᾳ, τῷ δὲ ἐναντιοῖτο; ἆρ' ἄλλα ἄττα ἐστὶν ἢ ταῦτα, οἷς τὸν εὐφυῆ πρὸς ἕκαστα καὶ τὸν μή, ὡρίζου;—* " Come now, and we will ask you a question: When you spoke of a nature gifted or not gifted in any respect, did you mean to say that one man will acquire a thing easily, another with difficulty? that a little learning leads the one to discover a great deal, whereas the other, after much study and application, no sooner learns than he forgets? or again, did you mean that the one has a body which is a good servant to his mind, while the body of the other is a hindrance to him? Would not these be the sort of differences which distinguish the man gifted by nature from the one who is ungifted? " Elsewhere Plato calls it θεῖαν μοῖραν and εὐμοιρίαν—that is, a good gift of the gods.

X. Cicero, too, had exceedingly clear views as to the importance of a Good Disposition or Nature, saying hereon in his *Pro Archia:*

" I admit that there have been many men of excellent parts and Virtue, and this without Teaching and by a natural endowment quite out of the common, and that they have of themselves displayed well-balanced and weighty qualities; and you may take it, into the bargain, that Nature avails more often to win renown without Teaching than Teaching does without Nature."

To the same purport is what Seneca says (*Epistle* 95): " Some men, through their endowment with exceptionally good natural parts, attain the standpoint of traditional knowledge without long pupillage, and embrace what is good directly they hear it." And Plato is credited with the saying: σοφὸς ὁ πολλὰ εἰδὼς φυᾷ, " The wise man is one who knows much by nature." It is, however, needless to invoke the support of great names where the thing speaks for itself.

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* Jowett, translation cited, p. 454.

XI. It is clear, from what we have now learned, that εὐφυΐα does not belong to the Intellect, nor solely to the Appetite, but to both of them, for it imparts its εὖ, or element of goodness, both to the one and to the other; so that no exclusion is made of a suitable disposition both of the internal and also of the external senses which subserve the operations of both Intellect and Appetite. As regards the Intellect, both Aristotle and Plato call that natural alertness of mind whereby truth is easily found and understood, the true εὐφυΐα which is proper to man. For man is said to possess Intelligence for the sake of truth alone. And in minds which are well endowed at birth, truth easily obtains a hold and becomes, by reason of kinship, συμφυής, identical in nature, and as it were one therewith, since by nature there is nothing truer than the Intellect, seeing that it is the beginning of all truths. That there was such a good natural disposition as this in Theætetus, Plato asserts not far from the commencement of the dialogue of that name. The direct opposite of this good natural disposition is that stupor of the mind which Aristotle (*Physics* viii) calls ἀῤῥωστίαν τῆς Διανοίας, *imbecillitatem mentis.* This is exemplified when persons are under hallucination in their perception of the truth of principles, as when some people say that everything is one or that everything moves or is at rest. Fallacious conceptions of this kind hinder the light of the Intelligence, so that it can not see even the primary truths. Therefore, so far as concerns the Intelligence, εὐφυΐα so equips it that it can distinguish with a certain natural facility and felicity what is lovable from what deserves hatred, and what is upright from what is dishonoring and base; while what εὐφυΐα gives to Appetite is that those who are εὐφυεῖς, and who follow the Judgment which has just been described, are endued with an equally effortless propensity to choose the good and flee from the bad.

XII. We now possess the means of solving the question whether εὐφυΐα is the same as *Ingenium* (Natural Capacity), for that is the Latin word which many translators use, as is well known; and among them is the Bishop of Caserta, who, in his book, *Eversiones singularis certaminis,* makes εὐφυΐα identical with *Ingenium,* adding that *Ingenium* and *Judicium* (Judgment—in Greek, κρίσις) coincide, so that there is no difference between εὐφυΐα, *Ingenium,* and *Judicium.* And the Bishop justifies this on the ground that the faculty whereby, when a mass of things is presented to us, we choose the true and avoid the false, is ordinarily called *Judicium;* and as, in *Topica* viii, passage cited, Aristotle assigned a critical force to εὐφυΐα, it follows that this is *Judicium.* The Bishop at the same time noted that the Philosopher in the same place ascribes to εὐφυΐα also the capacity rightly to choose the good and avoid the evil, which choice and avoidance belong to the Appetitive Faculty; and so he says that Aristotle is in that place giving to Choice (*Electio*) the wide meaning of approbation and adhesion.

XIII. But Piccolomini (*Gradus philosophiæ moralis* ii, 3) gives good reasons for rejecting this opinion. In the first place, there is no obvious identity between εὐφυΐα and *Ingenium;* for the latter is used indifferently of one whose mind is dull or quick, bad or good; whereas εὐφυΐα is limited, by reason of its εὖ (well), to what is good, and so some translators render it by *Bonum Ingenium* (good natural capacity) or *Ingenii bonitatem* (goodness of natural capacity). In the second place, although there is a certain kinship between *Ingenium* and *Judicium,* yet we find many persons who are sound enough in *Judicium* yet dull in *Ingenium*—so much so that our experience also distinguishes the two. Further, as the texts cited show, *Judicium* pertains solely to the cognitive power, while εὐφυΐα pertains also to the appetitive power; for by it we distinguish between bad and good, and then choose the latter. Nor can we admit so foreign and strained an interpretation of the word *Electio* in the passage cited from the *Topica* as would make it equivalent to Assent. It is therefore adequately and most aptly styled *Naturæ bonitas* (Natural goodness) by Cicero (*De officiis* 1).

XIV. Others, while accepting this wide meaning of εὐφυΐα, have divided it into two parts: the one, Speculative, called by Alexander of Aphrodisium πρώτη καὶ κυρίως εὐφυΐα, the primary εὐφυΐα, in the proper sense of the word; and the other, Practical. And they claim that Aristotle deals with the former in *Topica* viii, and with the latter in *Nic. Eth.* iii. It does not, however, appear that Aristotle has made any such division, but rather has in both cases treated them as one. No apt distinction can be drawn between the two; for with one part separated from the other, it is impossible to say that man is rightly formed and disposed by nature, εὐφυΐα being a good natural disposition of the soul towards both truth and goodness, in such sort that its attitude is right alike in its judgment between true and false and as regards the rejection of good and bad. From this it also follows that εὐφυΐα is not identical with *Ingenium,* this latter being indifferent as regards the good and the bad and the acquisition of this or that quality. Nay, it is not even the same as *Bonum Ingenium,* for this relates only to knowledge, while the εὐφυΐα of man considered as a citizen has an especial tendency towards action, so as to include the right and natural disposition both of the Judgment and of the Appetite.

XV. At this point in our investigation, we shall get a nicer appreciation of the force of εὐφυΐα by means of illustrations of the effects of Prudence and the Moral Virtues and by an exhaustive enquiry into the nature and amount of the contribution made by Nature thereto. I should like to repeat here the previously quoted text of the Philosopher (*Nic. Eth.* vi, 12, §§ 16, 17): "A man discharges his proper function when he acts in accordance with Prudence and Moral Virtue; for while Virtue secures that the doer has a right aim before him, Prudence

ensures the correctness of the means to it." The same idea occurs in the last chapter, § 31. And in *Eudem. Eth.* ii, 11, we find: "It is questioned whether Virtue directs the end or the means. Now we assert that it is the end which is fixed by Virtue." The Old Paraphrast gives the following explanation of this passage: "Prudence leads to every right action, and every right work is completed thereby; and Moral Virtue directs the Will towards an end which is good and secures rightness of aim. While Prudence seeks out the means which tend to a right end, it also deliberates by what especial means it best and most easily can and ought to compass its end." To this the admirable commentary of Eustratius may also be subjoined:

"How, then, does Moral Virtue secure that the aim and object is right, and Wisdom secure the means which lead thereto? Why, because, where these appetitive faculties are so chastened by Reason that they desire nothing but the good and honorable and never slip or sink towards the bad and dishonorable, a right object of the appetites is evolved and a right intent; so that no perverse allurement ever causes the intent to turn aside to anything unworthy, but it is always directed towards a praiseworthy and seemly end, Reason having now given a rational character to those same appetites and trained them to operate in a rational manner. For when the appetites have an object of this kind before them, Prudence leads them to a successful quest thereof by fit methods and by the elaboration and adoption of proper means; so that it ought to be assigned a prominent place among the Virtues and virtuous activities."

XVI. Passing over, then, the Speculative force of εὐφυΐα, what we gather from the preceding discussion is this: that, if the perfection of Practical Reason lie in Prudence, the perfection of the Appetite lies in Moral Virtue, and εὐφυΐα is the natural right disposition of each Faculty and has, indeed, so close a kinship with these Faculties that it is the natural and inchoate perfection of them, while Prudence and Virtue bring them to their full consummation. And that is why Aristotle ranks Prudence and some of the Virtues as things Natural, calling the former δεινότης, natural ability (*Nic. Eth.* vi, 12, § 25), and the latter ἀρεταὶ φυσικαί, Natural Virtues (*Nic. Eth.* vi, 13), and in the same chapter, § 6, φυσικαὶ ἕξεις, natural conditions or habits, and in his *Historia animalium*, ch. 1, ὁμοιότητες, φυσικαὶ δυνάμεις, ἴχνη καὶ σπέρματα, similitudes, natural faculties, traces and seeds. And that these faculties or tendencies of εὐφυΐα are natural he proves by various arguments, and among others by that in *Nic. Eth.* vi, last ch., § 6, καὶ γὲ παισὶ καὶ θηρίοις αἱ φυσικαὶ ὑπάρχουσιν ἕξεις, "For alike in children and in animals there are natural conditions or habits."

XVII. A passage in *Historia animalium*, bk. 8, ch. 1, illustrates this so clearly that I do not hesitate to quote it:

" The mode of reproduction, and the rest of the nature of animals, have now been described. Their actions and mode of life also differ according to their disposition and their food. For most of the other animals show traces of moral qualities like man's, though these are most clearly discernible in man. They exhibit gentleness or ferocity, mildness or cruelty, courage or cowardice, fear or boldness, violence or cunning; and many of them exhibit something like Prudence, as I remarked when speaking about their parts. For they differ from man, and man from the other animals, in a greater or less degree; for some of these traits are exhibited strongly in man, and others in other animals. Others may differ in proportion. For as men exhibit Art, Wisdom, and Prudence, animals possess, by way of compensation, some other physical power. This is most conspicuous in the examination of infants; for in them we see, as it were, the traces and seeds of their future disposition; nor does their soul at this period differ in any respect from that of an animal; so that it is not unreasonable for animals to present the same or similar or corresponding appearances. Nature passes so gradually from inanimate to animate things, that from their continuity the boundary and the mean between them are indistinct."

This teaching of Aristotle's about the image of Prudence in the brutes occurs also in *Nic. Eth.* vi, 7, §§ 9, 10: " For whatever is keenly observant of its own interests would be called ' prudent,' and would be entrusted with the control of those interests; hence we actually speak of certain beasts as ' prudent,' if they are seen to possess a faculty of forethought in regard to their own life."

XVIII. Ἔστι δή τις δύναμις, ἣν καλοῦσι δεινότητα. αὕτη δέ ἐστι τοιαύτη, ὥστε τὰ πρὸς τὸν ὑποτεθέντα σκοπὸν συντείνοντα, δύνασθαι ταῦτα πράττειν καὶ τυγχάνειν αὐτῶν, " There is a certain power, known as Mental Ability, which is such as avails to the accomplishment and attainment of the means which make for a desired end." The words are Aristotle's (*Nic. Eth.* vi, 12, §§ 25, 26). The word δεινότης is ill translated *Ingenium* by Perionius and others; for *Ingenium* relates wholly to knowledge, while δεινότης applies to matters in the realm of action. The distinction between δεινότης and εὐφυΐα is the same as that between the part and the whole. And how δεινότης differs from Prudence is easily ascertainable from what has preceded; for the former is a certain natural Διάθεσις, disposition, and an ἐπιδεξιότης, dexterity, in investigation, and a means of discernment, though a very weak and imperfect one, while Prudence is the perfection and consummated Virtue of Practical Reason. And while, says Aristotle (§ 29 of the chapter named), δεινότης is not Prudence, yet Prudence can not exist without it; moreover, the quality of Prudence can not be implanted τῷ ὄμματι τούτῳ τῆς ψυχῆς, in this eye of the soul, without Virtue. For the acquisition of any trained attribute is impossible unless the subject is fit to receive it; and the subject can not be fit in the absence of a natural ἐπιτηδειότης, aptitude, and εὐφυΐα. So says the Scholiast.

XIX. The same relation that subsists between Prudence and Mental Ability subsists also between the latter Natural Virtue and what is strictly and preëminently called Virtue. For each moral virtue exists in all men in some fashion by the operation of Nature: we are upright and temperate and brave, and have other virtues, from our birth. And just as there are in that part of the soul which deals with opinions (*δοξαστική*) two varieties, namely, Mental Ability and Prudence, so also in that part which is assigned to morals there are two, one being Natural Virtue and the other what is strictly and preëminently called Virtue. We learn this in *Nic. Eth.* vi, last ch. There is, then, such a Natural Virtue, an *ἐπιτηδειότης*, or aptitude, which takes its form, as if it were matter, from Virtue in the strict sense; while the appetites are subdued to a befitting *ὀρθότης*, or rightness, and rendered obedient to reason, which prompts and guides them to a good and honorable end. The Scholiast puts this neatly in the following note: *αἱ φυσικαὶ ἀρεταί, εὐφυΐαι πρὸς τὰς κυρίως ἀρετάς, αἳ μορφωτικαί εἰσι τῶν φυσικῶν, ὡς ὑλῶν, ἐκ τῆς πρὸς τὸν ὀρθὸν λόγον ἀκολουθήσεως τῶν ὀρέξεων δεχόμεναι τὴν τελείωσιν, καὶ οὕτω τὰς μὲν ὀρέξεις καθιστῶσαι ἐν τῇ ἁρμοττούσῃ ταύταις ὀρθότητι, τὸν δὲ λόγον ἔχουσαι πρὸς ἀγαθὸν σκοπὸν τὰς κινήσεις βάλλοντα.* "The Natural Virtues, good natural dispositions in comparison with the Virtues strictly so called, which are the shapers of the Natural Virtues as if they were matter; receiving their consummation from the obedience of the desires to Right Reason, and so establishing the desires in a rightness which befits them; possessing a principle which directs their activities towards the right goal."

XX. Some light hereon is lent by the Stoic simile which Cicero uses in his *Offices,* bk. 1, last part. Just as on the stage, the Stoics used to say, it is put to the actor's credit if he does not overdo the part given to him by the poet, and acts in every detail fitly and consistently therewith, so in life that man earns praise whose every action is so controlled as to conform entirely to the part which Nature or Fortune or his own choice has given him to play. For, says Cicero, there are four parts, as it were, which we are ordinarily called on to play. Two are given us by Nature itself; of these one is common to all, and in it we all are both sharers in reason and superior to the beasts, while the other is peculiar to the individual, being each man's personal qualities. The third part is assigned us by Fortune, and in accordance with it, of course, a man is king or noble or rich, etc. Lastly, the fourth is of our own choice or private judgment, and in it a man becomes a lawyer or soldier or merchant, and so on. And, as the parts thus depicted merge, as it were, in one part, so every one should so behave that, while playing each one of them faultlessly, he sustains with distinction the general part which, so to say, is the resultant of them all. Now the part which chiefly concerns us here is that part which the Stoics are wont to call *Propria persona,* or Individual Personality. Further, where Aristotle

says that any given moral virtue is in some sort present in men by the operation of Nature, and proves this by argument, Cicero derives a confirmation of the same from manifold experience. There was, says he, in Lucius Crassus and in Lucius Philippus, great charm; in Marcus Scaurus and Marcus Brutus, uncompromising rectitude; in Caius Lælius, considerable mirthfulness; and in his friend Scipio, a sadder cast of life. Of the Greeks we are told that Socrates was εἴρων, one who makes his points by means of under-statements, and that Pythagoras and Pericles obtained their unsurpassed authority without any mirthfulness. Hannibal was cunning; so was Quintus Fabius Maximus. Themistocles knew how to anticipate the plans of his enemies, and so did Jason of Pheræ. But these and other details may best be seen in the pages of Cicero, himself the most eminent Roman philosopher.

XXI. Before going any further, let us note that the question is not to be contemned which Eustratius propounds in his commentary on *Nic. Eth.* vi, 13. It is this: Seeing that Character (τὰ ἤθη) is Natural both in brutes and in man, why are not the Natural Virtues also called Moral from *mores* (character), *mores* being of Natural origin and the word *morales* being used, though ambiguously, as generally applicable thereto. To this Eustratius makes the following reply: " It must be borne in mind that the Moral Virtues are called ἠθικαί not from ἦθος (character) but from ἔθος (use and custom), with a change of the short ε into the long η, the idea being that these virtues are the outcome of habitual practice under the sway and rule of Reason, while the Natural Virtues are so called because they are from the outset a gift of Nature to those who possess them. Nature, then, being the efficient cause of the latter, and Habituation the efficient cause of the former, the name is in each case given with appropriate reference to the cause. *Mores* or ἦθος, Character, is not a cause, but the product of a cause, Nature, to wit. Aristotle expressly says that the Moral Virtues derive their name from ἔθος, Habituation, declaring in the second book of the *Nicomachæan Ethics* that the name Moral Virtues comes from *mos,* that is, ἔθος, with a slight modification and change. Now *mos,* Usage, is not Natural, like *mores,* Character, is, but a habit is formed by dint of practice and exercise. The aptitude for any given virtue lies in us from our birth and begetting, but that does not warrant us in saying that we are endowed with Virtue in the strict sense of the word. What we are concerned with is a different thing, namely, the Good in the strict sense, Virtue properly so called, although it shares the name Virtue with Natural Virtue." Thus Eustratius (through the medium of Johannes Bernhardus Felicianus' translation).

XXII. If, then, some Virtues be Natural in man and others Moral, deriving their ποιότης or quality from the habitual practice of Goodness, the actions which correspond to these faculties will also be

twofold. Now, so far as they all relate to life, let me divide them into τὰ ἤθη φυσικά, *mores naturales,* Natural Character, and τὰ δι' ἐθισμόν, Character derived from Habituation. Not that I am ignorant that there is no warrant for styling the activities of the natural faculties *mores,* but this is not more improper than to style δυνάμεις φυσικαί, Natural Powers, Virtues, for Virtues properly so called are also due to Habituation more than to anything else. If, indeed, I wanted to adopt here the distinction which some draw between the Actions of Man and Human Actions, the latter being peculiar to man but the former common to man and the brutes, then, indeed, the activities of the Natural Virtues would have to be classed as Human Actions and not as Actions of Man. For although the brutes, too, may be called brave or gentle or tamed, as we are taught at length in *Historia animalium* viii, 1, yet the natural activities of human goodness are much more excellent, for they issue from εὐφυΐα; and because this is the natural perfection of (among other faculties) the most excellent faculty of Reason, they may to that extent be also called both human in the proper sense and naturally good and moral. If, however, any one be so obstinate as to refuse to admit or suffer this last proposition, he will at any rate bear with me just while I enquire whether this distinction is of any help towards the examination of the views of that distinguished Philosopher and Physician, Galen; thereafter, let him vent his rage on the distinction in my person.

XXIII. Galen wrote a treatise on the following topic: τὰ τῆς ψυχῆς ἤθη ἕπεσθαι τῇ τοῦ σώματος κράσει, "*The Character of the Soul follows the Bodily Constitution.*" And we soon find him asserting, Ταῖς τοῦ σώματος κράσεσιν ἕπεσθαι τὰς δυνάμεις τῆς ψυχῆς, "The faculties of the soul follow the bodily constitution," etc. Here I should like it observed that what in the title are called ἤθη ψυχῆς, Character of the Soul, are at once called δυνάμεις τῆς ψυχῆς, faculties of the soul. The next thing to be remarked is that Galen assumes that the Soul itself is κράσις, a composition, an assumption which he tries to support by certain arguments and by the authority of Plato, Aristotle, and Hippocrates (chs. 6, 7, 8), and also that the character of this composition or Soul changes by reason of place and food and the general proportion of its elements. After these assumptions, he makes (to put it mildly) many rash assertions, such as, that every one's soul is not of the same nature, and that while Plato holds that the soul is rational, he himself would not maintain either that it is or that it is not so, saying, ἐγὼ δὲ οὐθ' ὡς ἔστιν, οὐθ' ὡς οὐκ ἔστιν ἔχω διατείνασθαι. In the same chapter, after refusing to admit this doctrine of Plato, he continues: ἀκόλουθον ὁρῶ τοῦτο, τῷ περὶ ψυχῆς δόγματι τοῦ Πλάτωνος, ἀπόδειξίν γε μὴν οὐδεμίαν ἔχω λέγειν αὐτοῦ, διὰ τὸ μὴ γινώσκειν με τὴν οὐσίαν τῆς ψυχῆς, ὁποῖά τίς ἐστιν, ἐκ τοῦ γένους τῶν ἀσωμάτων ὑποθεμένων ἡμῶν ὑπάρχειν αὐτήν, which Bartholomæus Sylvanius of Salone translates thus: "I see the consequence which flows from this doctrine of Plato about the soul, but I

have no proof thereof to adduce, owing to my entire ignorance about the existence and nature of the soul, it being of course an assumption of ours that it belongs to the class of immaterial things." And the short passage which comes next is also of importance:

"For in material things I perceive sufficiently marked diversities of composition, one from another, and a vast number of these diversities, but I can not understand any difference in immaterial substance which is capable of existing of itself without either quality or kind of body—and this despite repeated reflection on the matter and my most careful examination. Nor can I grasp how, if it be in no sense a part of the body, it can be coëxtensive with the body. I have found myself quite unable, however long I might meditate on these matters, to attain even to the imagination thereof, οὐδ' ἄχρι φαντασίας."

XXIV. I really do not know what he means in ch. 4, where, when controverting Andronicus, he seems to overthrow his own doctrines. The passage runs:

"Now I much commend Andronicus the Peripatetic for the fearlessness, befitting a man of honour, with which he has declared the existence of the soul without enshrouding the matter in any obscurity, and I accept his manly utterance. For I have found him the same in several other matters. But when he says that the soul is a composition or a faculty (δύναμις) of that composition, I take exception to his addition of faculty as an alternative."

Galen then returns to his own argument, that the soul, be it better or worse, is the product of certain qualities. And, among the rest, we have this in ch. 5:

"But although they refused to admit that dryness is the source of Wisdom, yet the School of Heraclitus conceded it. For it was a saying of Heraclitus, αὐγὴ ξηρά, ψυχὴ σοφωτάτη, 'A quite wise mind is dry light.' Now in this saying he claims that dryness is the cause of Wisdom; the word αὐγή, light, shows this. And it must be deemed the better opinion, for we conceive the stars, with their conjoined qualities of light and dryness, to be also endowed with highest Wisdom. And if any one says that this has no application to them, he shows himself insensible to the excellence of the gods."

And when in ch. 7 Galen proposes to show from the writings of Aristotle that our soul changes with the constitution of the body, we come across the following noteworthy passage:

"This being premised, Aristotle proceeds to subjoin the following: 'It is, indeed, reasonable that the nature of the blood should be the cause of much that comes to animals, both through their character and also through their senses; for it is the material of the whole body, since, while food is the material, the blood is reckoned the final food. It accordingly makes all the difference whether the blood be warm or

cold, thin or thick, turbid or clear.' Now as other remarks of Aristotle may be found both in his treatises on *Animals* and in his books of *Problems,* it seems superfluous for me to set them all out. It is enough for me to have indicated his views on the composition of the body and the faculties of the soul. Still, I will mention his teaching in *Historia animalium,* bk. 1, that some of the points in animals which are clearly referable to temperament, are so by the intervention of physiognomonic signs, that is, Nature's proof, and especially his teaching (if this be a correct presentment thereof), that the whole bodily formation in the case of each kind of animal is so built up as to match the qualities and faculties of the soul. For example, the generation of animals that have blood is from the blood of the mother, and the character of their soul follows the quality of this blood," etc.

XXV. Although there is much here and in the same book that is paradoxical, and although Galen's views about the Soul seem to clash with received teaching and with Nature, yet not all of his treatise is to be wholly rejected as frivolous. As regards the existence of the Soul we will not pronounce any biased judgment; but the thesis that Character depends on the quality and nature of the composition of the Soul (τὰ ἤθη ἕπεσθαι τῆς φύσεως κράσιν), is relevant here; and it is entirely true, if we read the word "Natural" (φυσικά) before "Character" (ἤθη). For although that eminent man never seems to vary in his use of words, yet the attentive reader will certainly perceive that he is especially and mainly speaking of the propensity of Natural Character and that he distinguishes it well from Character in the strict sense. See what he says in his last chapter: εἰκότως οὖν καὶ τῶν ἀνθρώπων τοὺς πονηροὺς μισοῦμεν, οὐ προλογιζόμενοι τὸ ποιῆσαν αἴτιον αὐτοὺς τοιούτους. ἔμπαλιν δὲ προσιέμεθα καὶ φιλοῦμεν τοὺς ἀγαθοὺς εἴτε φύσεως, εἴτ' ἐκ παιδείας καὶ διδασκαλίας, εἴτ' ἐκ προαιρέσεώς τι καὶ ἀσκήσεως ἐγένοντο τοιοῦτοι; that is, "We quite justifiably hate the bad, without making any previous enquiry into the cause of their being bad; on the other hand, we admit and love the good, whether they be so by nature or by training or by deliberation and meditation" * (more correctly, practice or habituation). The distinction here drawn between those who are good or bad τῇ φύσει, by nature, and τῇ προαιρέσει, by deliberation, is a sound one, although Galen is wrong in saying that in our hatred of the bad we pay no heed to this distinction. For, so far as we are good by nature, this is almost a matter of necessity; and the love felt for such goodness is that felt for any natural good, while the matters of deliberation involve the exercise of our free-will and bring in the element of true morality; and so they alone deserve praise or blame, reward or punishment. Galen develops this idea in the sequel, saying: "Accordingly we are made bad by the development of habit with reference to that part of the soul which is irrational, but we are imbued with false

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* From a Latin translation of Galen.

opinions by reference to the intellectual part thereof. So if we receive instruction from men who are good and humane, our opinions are true and our character humane." This passage is wanting in the Greek text, and has been restored as above from an old translation. That Galen's special topic here is the propensity of Natural Character, is made unmistakable by the fact that he quotes from *Historia animalium* i, 1, an explanation of which I have already in part given above.

XXVI. What share Galen allows to Education and Habituation and to Natural Parts may be seen from the remarkable passage in ch. 7 of the book *On the Diagnosis and Cure of Diseases of the Mind,* which Latinists call *perturbationes,* Disturbances. Some may be inclined to blame me for adding to the numerous extracts from Galen a transcription of this lengthy discussion; but, when I think how great were Galen's authority and learning and how few handle him nowadays, I am not at all frightened by Theon's * tooth. This, then (by the aid of the translation of Bernardinus Donatus of Verona), is what Galen says:

"That these things are bad and ought to be shunned, it is worth while to discern in the case of those men who are in their toils. For the baseness of such men is very manifest. Why we do not ourselves discern anything of the kind in ourselves must be set down to our blindness as regards both what loves us and what we love; moreover, there are some things which escape our attention as trifles and are neglected by us, but which can not be neglected in others because of their bigness. We ought, then, to find some elderly person who is capable of observing this kind of thing, and ask him to point it all out to us with the utmost freedom. And then, if he has told us something, we ought at once to be very grateful to him. And after leaving him we ought to face it and consider what it is, and take ourselves to task in solitude and try to get rid of the affection in question, not only in such a way that it is no longer observable by others, but so that we do not leave any root of it at all in our mind. For if we leave any bit of it behind, it will sprout up again, nourished by its own badness and corruption. And we ought to scrutinize, one by one, in ourselves all the affections which we discern in our friends and relations, and examine whether anything of the kind can be found in our mind. And any such must be removed while still in the germ, without waiting for it to grow and become incurable. Everybody deems sadness and sorrow and the like to be obvious ills, just like bodily distress; but most people reck little of all other affections of the mind, although they despise others when they see them influenced thereby. Some time ago a young man whom I knew very well, and who used to declare he was unaffected by trifles, found on one occasion that this was not the case. So he came to me very early one morning and said that the matter had cost him a sleepless night, during which he had come to

* A satirical poet; see Horace, *Ep.* 1, 18, 82.

think that he had never been so much upset about big things as he had been about small ones. And he accordingly wanted to know how that had come about, and whether he derived this tendency from any habit that he had learned or from Nature. My answer to him, and a true one, was that in young people Nature is the most potent factor in the shaping of life, study and deliberate practice occupying the second place. For it is easy to see, in the young people we casually meet, how much we differ from one another in nature and disposition, some being observed to be always bright, and others always sad; some ready to laugh at everything, others in despair on the slightest pretext; the ideal of some is equality and the general good, while others delight in rapine and plunder; some are ready to blaze out on the slightest provocation, even biting or kicking stocks and stones with intent to avenge some hurt which they think they have caused them, while others are quick to forgive and gentle, slow to anger or tears, save on great provocation. That is why the actor Eupolis represents Aristides, surnamed the Just, as giving to Nicias' question, How he got that surname, the sound and sober answer, that it was first and foremost the work of Nature, but that he had himself been ever ready to second the efforts of Nature. Young people, then, are prone by nature not only to sorrow and sadness for any reason whatever, but also to hot outbursts and to the desire of dainty food. Of that kind of vice which belongs to their years I have already said a good deal; but, in addition, some young persons may be observed to be shameless, others to be modest; some to be endowed with a mindful nature, others forgetful, others too absolutely oblivious. There are some who readily and willingly submit to the toil of learning; others are careless and stupid. Again, of those who are quick at their work, some are soon elated by praise, some are at once downcast with shame at any seeming slight by their teacher, and some live in terror of whipping. Understand the same of the sluggards, though not for the same reason. And so, from what every one sees happen in the case of young people, they are classed as modest or immodest. On the same ground some are called ambitious and upright, others bad and careless of honor; some timid, and others heedless of rebuke. And other different labels are put on them, corresponding to other characters. Thus, we find among the same young people some who are naturally mendacious, others truth-lovers; and there are many other differences of character in them, which can not be enumerated here consistently with our present scheme. Some of them are very apt in receiving good training; in others this training is of no influence. Yet this does not justify the neglect of these young people, but they ought to be nurtured in good qualities. For if good care and diligence are bestowed on their nature, we shall succeed in turning them into good men; and if we fail and no useful fruit of our attentions be garnered, at any rate it will not be our fault. For the education of the

young is much like the care and attention which we give to the cultivation of plants and trees. Your planter and cultivator of trees and plants may be never so good, but he will not make a bramble bear a bunch of grapes; for the nature of the thing prevents a consummation so inconsistent with the law of its being. Vines, again, which so far as they are themselves concerned are ready to bear fruit, will be found either to deteriorate or even to give no fruit at all, if neglected or left to the sole care of Nature. The same happens in the case of animals: you may train a horse so that he is useful in many ways; but it does not follow, because you have once broken him in, that you will find permanently tame and amenable. But vipers and scorpions never get as far as seeming tamed."

XXVII. Galen, then, assigns the principal part to Nature, and a secondary part to Education; this is clear from the above. Now what is his authority therefor? In one word, Experience, as he, too, holds. Accordingly, in the last chapter of the book, *"That Character follows Constitution,"* he declaims as follows against those who will not accept his opinion:

"What philosophers of this present time say must be disregarded. Of a truth it would be better to call them, not Philosophers, but professors of philosophy; for if they carried on their enquiries in the right way, they would first of all see this, namely, that they derive their bases of proof from what is obvious to the senses; and, seeing that the ancients are known to have done this, they therein deserve to be called Philosophers by the men of this age."

Galen also gives a remarkable illustration drawn from his own nature and habituation (*On the Diagnosis and Cure of Diseases of the Mind,* ch. 7, towards end, and ch. 8):

"I could not easily say what my Natural Character is! for Self-Knowledge is hard even for a mature man, much more for a boy. But it was my great good fortune to have for my father a man free from all anger, exceedingly just, frugal, and humane; while my mother had so violent a temper that she would sometimes even bite the serving-maids and would continually be scolding and quarrelling with my father, far worse than the notorious Xanthippe did with Socrates. So I had before my eyes the good and honorable way in which my father discharged his duties and, in sharp contrast therewith, the vicious affections of my mother; and it came to me that I ought to adopt and love the former line of conduct, and avoid with loathing the latter. And at the same time that I discerned herein the difference between my parents, I also perceived that my father was not put out by any hurt, while trifles would cause my mother the utmost chagrin. You know, further, how young people will imitate what they have paid eager attention to, while they will remove themselves as far as possible from what they have been pained and annoyed to see."

XXVIII. Hurrying on, to see what truth or falsity there is in this opinion of Galen, we find that three things call for our separate consideration: Propensities towards the Affections, the Affections themselves, and lastly Character; for Character is not simply the Affections, but is fashioned by a certain condition of Affection and is a mode of the Affections. Next, the name *Mos* seems to be used in a twofold sense, either for internal behavior or for external behavior issuing from internal. *Mos* of the external kind is, then, action moving from *mos* of the internal kind, of which it is, as it were, the stamp and sign. *Mos* of the internal kind is a determination of the mind towards some act; and this in its turn is twofold, being either open to us from its birth (wherefore I called it Natural Character above) or gradually acquired by our definite endeavors. That kind which comes from Nature is manifested either in the whole of mankind or in some particular people, whereon see Aristotle (*Problemata,* § 14), Bodin (*Methodus legendi historias*), and Barclay, in his *Icon animorum.* So Galen, at the end of his book, *The Character of the Soul follows the Constitution,* says as follows: "Among the Scythians there has been only one philosopher within the memory of men, but at Athens very many. At Abdera there are many stupid people, but few at Athens." And Demodocus, in Aristotle (*Nic. Eth.* vii, 8, § 12), says of the people of Miletus that they were not fools, but only acted like fools. Or this behavior may manifest itself in individuals. Of such Aristotle says (*Nic. Eth.* vi, last ch., § 4): καὶ γὲ δίκαιοι, καὶ σωφρονικοί, καὶ ἀνδρεῖοι καὶ τἄλλα ἔχομεν εὐθὺς ἐκ γενετῆς, "We are just and temperate and brave and have other virtues, straight-away from birth." Seneca also has several passages on this topic, and among them, in *Epistle* 95, the following: "Our minds carry the seeds of all things honorable, and these are developed by admonition, just as a spark becomes a flame when gently blown on."

XXIX. Further, that variety of *Mos,* or settled behavior, which comes with years, as the result of definite endeavor, is also of two kinds. It is either Inchoate and Imperfect—a certain Διάθεσις, or Disposition—or it is Perfect and Constant, a Habit; and this latter is strictly and preëminently called *Mos,* as shown above. With this, Aristotle deals in *Nic. Eth.,* bk. 2, giving many proofs that it is produced and developed by habituation.

XXX. This makes it easier to learn whether or no Character follows the bodily constitution. If any one means by ὰτῆθη (Character) a natural propensity to this or that πάθος, Affection, I have no doubt that it follows that constitution; and just as the latter is various and changeable, so the former varies and changes. Who but knows that the Melancholy are prone to sadness and the Choleric to anger? Nay, the power of the constitution is so great as often to oust reason, either for a time or in perpetuity. See, for illustration and proof hereof, Aris-

totle's *Physiognomonica* and his well-known *Variorum problemata.* That is why some people are ordered fastings, lest, when the body is full of rich blood and food, the soul should tend to become lascivious and lustful. The same principle applies to that Natural Character which we receive at the outset: it, too, follows the constitution.

> Naturæ sequitur semina quisque suæ.
>
> (Every one follows the seeds of his own nature.)

And another poet says

> Naturam expellas furca tamen usque recurret.
>
> (Should you drive out Nature with a pitchfork, still she will every time speed back.)

And indeed, if we love truth, Galen's words in the book mentioned are very significant on this topic. For why does he so soon call τὰ ἤθη ψυχῆς (the soul's Character) δυνάμεις (powers)? why does he say that τὰ ἤθη (Character) comes in part ἐκ φύσεως (from Nature), in part ἐκ προαιέσεως ρκαὶ ἀσκήσεως (from deliberate purpose and exercise)? and why does he attribute so much to Education and Habituation—if the Character properly so called is also inevitably determined by its connection with the bodily constitution?

XXXI. Meanwhile I admit that Galen in the excess of his ardor put forward some things (last chapter of the book) which appear capable of application to Character properly so called and to show that it too follows the constitution. He seemed to think he had found something which other philosophers were ignorant of, and so he raises an objection thereto on their behalf and then gives a bad answer to it:

"How then, say they, can any one deserve praise or blame, or hate or love, if it is not his own fault that he is bad or good, but the result of his constitution which has come to him under other influences? We will reply: Because there is planted in us all a tendency to embrace and frequent and love good men, and on the other hand to dislike and hate and avoid bad men; and this is found in us apart from any consideration whether the quality is inborn or otherwise. For it was not the fact of the quality being inborn or not that made them lovable or hateful or of whatever kind they were. It is on the same principle that we kill scorpions and venomous spiders and vipers, they being what they are, not of themselves, but so begotten of Nature. Plato, when affirming that God, the First and Greatest, is uncreated, yet calls Him good; and we worship Him with natural love, though He is such as He is from eternity and has not been made good by Himself; for He has not been made at any time, but is everlastingly uncreated and eternal. We do no wrong, then, in hating the bad even without previously enquiring how they came to be bad, whether it was by nature, or by instruction, or of deliberate

premeditation. Nay, we put the utterly criminal to death, and this for three quite valid reasons: first, to prevent them from injuring us with impunity, and secondly, in order to strike into men of the same kind a fear that they too will be punished for their misdeeds. The third reason is, that it is better, in their own interest, to die; corruption has so invaded their mind that their badness is irremediable, beyond even the cure of the Muses, nor could Socrates or Plato make them yield good fruit. Now I wonder at the Stoics for this, that they held that all men were capable of Virtue but had been perverted and depraved by those no longer alive; for, to pass over everything else which demolishes and overturns this doctrine, there is one question I may ask, namely, What about the first men, who had no predecessors? The Stoics can not say by whom these were depraved! "

XXXII. So Galen, with (to put it gently) an excess of confidence. It is his false hypothesis, that the Soul is itself a compound, which has led him to these absurdities. Next, the matters which depend on composition are of two kinds. In one kind the dependence is necessary and can not be corrected or altered, namely, tastes, smells and such like; these depend on composition as their chief and sufficient cause. Then there is another kind where the dependence is not equally inevitable, but the natural capacity can be altered and amended in various ways by effort and practice; to this kind belong the propensities, affections and characters of men. Character, then, in the strict sense, does not necessarily follow the constitution, but is within the domain of our faculties and discretion and is developed by practice and habituation, the strength of this latter being such that it deserves its name of Second Nature. What it is we can well learn from our Master, Aristotle (*Problemata,* § 28): "Why do some become ill when they give up the luxurious style of living to which they have been accustomed?—like Dionysius the tyrant, who straightway went into a decline when the siege of his city deprived him for a short time of his accustomed beverage. How great the importance of Custom to everybody! It becomes almost a habit of nature." In a more polished manner he says (*Rhetoric* I, 11): "What is customary becomes like what is implanted by Nature. Custom resembles Nature; for there is close kinship between what is often and what is always. Now we say Nature of what always is, and Custom of what often is."

XXXIII. You may say that we are taught by experience that, though character does not follow the bodily constitution in the inevitable fashion, yet that it does follow it very frequently and as a rule. I do not object to this; for it is most certain that those activities and efforts to which we are prone by nature, proceed with easier course, and are sought and undertaken with greater alacrity, than those for which we have no such proclivity. Men of the οἱ πολλοί (mob) class who are

prone to this or the other vice do not amend this propensity nor bridle their sinful passions, as they ought to do and could do; but they follow their natural impulses and plunge into all sorts of vice. But the good and εὐφυεῖς, and those who have had right training and education, bring to the good propensity of their nature the aid of their efforts and habituation, and in this friendly alliance they strive for all things that are excellent. And if it chance that the prickings of some malign suggestion goad their soul to some forbidden pleasure or to anger they check them and, as the saying is, beat them down in the blade. Aye, and the quite opposite experience of those who were born ἀφυεῖς, not well endowed by nature, serves as a strong confirmation hereto. Take the case of Socrates and his disciple Phædo, whom he turned from a wanton into a distinguished philosopher. And when Polemon, drunk and begarlanded, burst into the school of Xenocrates, the latter, by merely reading him his work *On Temperance,* changed him from a shameless glutton into a man of self-restraint; and Polemon was appointed by Xenocrates to be his successor. And what is it that Cicero, in his *De fato,* tells us of Stilpo of Megara? "His intimates write that he was given to wine and women. They do not write this to his blame, but rather to his praise; for he so subdued and kept his nature down by the aid of learning, that none ever saw him the worse for wine or found in him any trace of lust." The story about Æsop, too, is well-known. Now if, as Galen says, Character inevitably follows the Constitution, how came this change in these men? What ὁ ἐξηγητής, the Interpreter (Cicero), says in his book *De fato* is entirely true, "Men acquire this or that character according to their different practices." Indeed, as Galen's contention is almost in harmony with that of those who make men's character depend upon fate or the stars, the whole of that well-known book of Alexander is in point here, in which, while giving an admirable explanation and proof of Free-Will, he so refutes the opposed doctrines that the book is worth its weight in gold. So much so that at this juncture I will not give any further proof, against either the one school or the other, of the Freedom of the Will.

XXXIV. But, you say, if the affections of the soul be subjected to careful scrutiny, we shall find that some, such as madness and insanity, follow a fixed and definite type of constitution; for these operate with such violence, and disturb the functions of the mind in such a way, as utterly to destroy the sway and government of reason, so far are they from being controlled or improved by it. Now we have to realize that these are not natural affections or emotions, but rather sicknesses, so that their victims are not cured by teaching or by precepts, but by hellebore and other drugs; and if they do anything wrong, their insane character does not call for the intervention of any law, but for such restraint as the case requires, and in no wise for punishment. Mental

affections of a different kind can be redressed by discipline and right habituation and culture. This may in a certain degree be observed in the brutes, for the actions of their minds may be admitted to follow their constitutions more than is the case in man; yet there are certain kinds of animals whose natural propensities admit of improvement under the influence of discipline, such as the horse, dog, elephant and other wild animals which can quit their wildness and be tamed. And this change of character is in them also effected by means of Reason, though not their own Reason (for they have none), but man's. Hence the Greek Scholiast is right in saying, "Character in the proper sense is competent to man alone, being inseparable from Reason."

XXXV. Assuming, then, that Galen's opinion was that Character properly so called, no less than other kinds, must needs follow the constitution, let us see what arguments can be brought in answer. I have already called attention to the false hypothesis, That the Soul is a composition or is the product of a composition. This being assumed, this other proposition follows inevitably, That Character of necessity follows that composition. So, ἑνὸς ἀτόπου δοθέντος συμβαίνει τὰ πολλά, "The admission of one absurdity lets in many more." Again, this doctrine about Character properly so called is clearly opposed to Nature, for things that absolutely issue from Nature as their sole authentic cause are utterly unlike those of which the efficient cause is freedom of action and habituation, whether (to use a Scholastic distinction) you consider it as an active energy or as a set of specific qualities. How inconsistent with experience the doctrine in question is, I have already proved with a certain amount of detail; for if it were true that Character depends on temperament alone, no man could alter, in regard of moral ποιότης (quality), either by effort or by practice, but always would remain unchanged and be what his temperament makes him; for that can neither be at war with, nor rise above, itself. Then, as to that point about Punishment serving as an example by which others are deterred from similar offenses, it is sound in the thesis but inconsistent with the hypothesis. For if Character followed the constitution inevitably, this terror would be futile; nay, the bad man would the rather persist in the forbidden and continue to follow what is denied him. Moreover, the blame would then have to be laid not on the man's Character, but on Nature itself; and, if everything came to pass of necessity, what would be the good of laws and to what end do you reward one man and punish another? Next, when Galen takes his illustrations from venomous animals, he heaps error on error. For if these were bad in themselves, they would be so either morally or naturally. Now, no one would say that they are bad morally, unless he had a gourd in his skull instead of a brain; and they are not bad naturally, because their poison does not detract from the perfection of such animals but completes it. And even granted that

these are bad naturally because of their poison, is it in method (μεθοδικῶς) permissible to draw conclusions about the nature of Moral Evil from the nature of Natural Evil?—to say nothing of the fact that this opinion is rightly open to the charge of impiety in that according to it God would be the author of the offense! Of the testimony of Plato and Aristotle and Hippocrates I will say nothing, because we have already in part considered their views and they agree that men vary in their propensity to various characters and conduct. Then, as regards Galen's hostile criticism of the Stoic doctrine and his question, Who would there be to deprave the earliest men? there is no substance in it. He might have learned this fact from the same book of Moses from which he got what he says about generation (*De usu partium corporis humani,* bk. 11, ch. 14). But we will not cut all this back to the quick. Let him who likes read in addition hereto Piccolomini's *Gradus philosophiæ moralis* 1, ch. 28, 19 and 30; also Horneus' *Philosophia moralis,* bk. 3, ch. 1, summ. 4, onwards.

XXXVI. Now let us say something, even after all this, concerning Hippocrates, whose teaching about the propensities of Natural Character is less involved and clearer and sounder than that of Galen, whom he preceded by a considerable time, being πάντων τῶν ἰατρῶν κορυφαῖος, the first of all physicians. He, in his book *On Airs, Waters, and Places,* asserts more than once that both shapes and characters and natures are found to vary very much with changes and diversities of the seasons, also that men's figures and characters largely follow the nature of the locality. And he gives many illustrations in proof of this. Thus, after saying that regions sloping towards the rising sun are healthier than those which are open to the north and to hot winds, he adds that dwellers in the former have good voices and are better equipped as regards both anger and wisdom than dwellers in the north. He also says that Asia far excels Europe in the nature of the produce of its soil and in its men, everything being finer and bigger to begin with in Asia, the country more kindly than Greece itself, and the character of the inhabitants humaner and gentler. He also maintains that those who dwell in a rough, unwatered mountain-region and those who experience considerable differences of season are big in build and admirably equipped by Nature with strength, but that such natures are endowed with rustic and wild characters. And so he comes, at the end of that book, to the generalization, That where the changes of the seasons are frequent and very pronounced, very different figures and characters and natures are found; and That men's figures and characters follow the nature of the locality. And he further deduces this, that where the land is fat and soft and well-watered, but the rivers are very high up, so as in summer to be hot and in winter cold, the inhabitants are fleshy, with ill-articulated limbs, weak, unfit for toil καὶ τὴν ψυχὴν κακοὺς ὡς ἐπὶ τὸ πολύ, " and of a very low type of

mind." But where the land is bare, ill-provided, rough, ravaged by cold, scorched by heat, there one will find the men are hardy, graceful, with well-articulated limbs, fleshy, hairy, and naturally industrious and vigilant in their occupations; but of haughty dispositions, prone to anger, obstinate, of rough rather than of gentle make, acuter and more dextrous in the arts, and better in war.

XXXVII. This shows how much Hippocrates assigns to Nature and natural things with regard to the change and variation of Character. All the time he leaves its due place to the cultivation of this Natural Character, which cultivation is of especial utility in setting up an habituation in accordance with Law. So, after saying that the Asiatic race is more slothful than the European, and that it clearly ἄναλκες εἶναι, "is weak," he declares that on this account it was particularly necessary for Asiatics to be kept in order by Law. And so also, after saying that dwellers in hollow, grassy and excessively hot spots where the winds are hot rather than cold, and where the water used is hot, are not so well gifted by nature as regards strength of mind and endurance of fatigue: νόμος δὲ προσγενόμενος, ἀπεργάσοιτ' ἄν, "but a supervening rule of life will effect that." And how admirably Nature is supplemented or improved by a rule of life (he always calls this νόμος), or the latter by the former, he shows by his neat account of the Macrocephali, or Longheads, earlier than whom there was no race with that shape of head:

"To begin with," says he, "it was an institution of man that was the cause of longness of head; but now Nature has come to the aid of this institution. For those who have the longest heads are reckoned the best-born. This is the method of the institution: Directly the child is born, its head, while still very pliable and soft, is so manipulated as to compel a growth in length; circlets and similar devices are employed to improve on the roundness of the head and add to the length. This institution opened the way first for a nature of this kind; but in course of time it passed into nature, so that there was no longer any need of the institution. For the generative seed is drawn from all parts of the body; bald people are born from bald, gray-eyed from gray-eyed, and (speaking generally) deformed from deformed; and the same principle applies to the rest of the frame. Why, then, should not a Macrocephalus breed a Macrocephalus?"

XXXVIII. That being very true, which Galen says towards the end of his treatise, *That Character follows the Bodily Constitution,* namely, that it is very hard and rare to find a blameless youth, no matter how εὐφυής he be, αἰδώς, a sense of Shame, seems to be a part of εὐφυΐα or a necessary consequence. For young people nearly always indulge their passions, and we deem that these should be held in check by the sense of Shame as by a bridle. But in the case of the grown-up, who are led into sin not so much by their passions as by their deliberate

choice, recourse must be had, not to the sense of Shame but to punishment and sterner remedies. But let us hear the Master. These are his words (*Nic. Eth.* iv, last ch., § 6, onwards):

"This πάθος, or Affection, is not becoming to every time of life, but only to the earliest. For those of this age ought, in our view, to be modest and susceptible to Shame, their time of life being liable to constant disturbances and numerous lapses, from which they are recalled by the sense of Shame. And we praise those young people who possess that quality."

Now, as this is rather an Affection than a Habit—though on this point Alexander of Aphrodisium (*Quæstiones morales* 4, 21) is at issue with Aristotle—the Stoics simply condemn it like other Affections. They make here a big mistake both in speech and in thought; but so far as they reckon it a part of Temperance—and Cicero joins it, or I might say confuses it, therewith (*Offices* i)—it is cried up by them as a Virtue.

XXXIX. Now, this quality is not befitting to every time of life indiscriminately, and the Scholiast aptly points out that this leads Homer and Hesiod at one time to call it praiseworthy and at another to call it blamable. Ἀνερυθριάσας ὁ Χαρμίδης, πρῶτον μὲν ἔτι καλλίων ἐφάνη. καὶ γὲ τὸ αἰχμητηλὸν αὐτοῦ τῇ ἡλικίᾳ ἔπρεψεν, "Then Charmides blushed, and this added to his charm. For Modesty befits his time of life." So says Plato in his *Charmides* (my copy, p. 237). And Piccolomini is also entirely of our way of thinking, *Gradus* 4, ch. 32, where he says that Modesty may be said to be a becoming state of mind which we by nature are able to develop. And that Modesty shows a good natural disposition and an ingenuous mind, you can easily gather from that remark of Diogenes to a young man who was blushing, "Cheer up, my son, that is Virtue's color," and also from the saying of the comic poet, "He blushed, so all is well." I have, however, elsewhere had something to say about Modesty and the sense of Shame. And the topic can be pursued in Mevius' *Prodromum,* insp. 2, n. 10, onwards.

XL. It remains to show what there is to help the development of that εὐφυΐα and the growth of those seeds of Nature towards the perfected habits of Virtue and Goodness. Undoubtedly the most important help is that rendered by what, following Aristotle, we described in an earlier part of this work, Teaching and Habituation. On this topic something further may be said. I said that it was a principle of Law that it produced no effective obligation until it was promulged. Now the Laws of Nature are promulged in different ways, sometimes sooner, sometimes later, with more or less clearness, in greater or less numbers; and the subsequent assent to them may be strong or weak or doubtful; the rank assigned to them may vary much. And all this depends on, first, the way in which the individual is endowed by Nature—alert or dull, prone to good or to evil; secondly, on his Teaching, according as

it be true or false, inchoate only and broken off sooner than is right, or continued and completed without any breach of due sequence; then on Habituation, according as it has been effected early and attended to in due time, place, and manner, and with sedulous fidelity; and also on the kind of Society in which the individual has lived, whether it was one in which he could live honorably and enjoy familiar intercourse with honorable men. So it is clear that Natural Laws are not all promulged in the same way and that the knowledge of them does not reach all and sundry at the same time, but that this promulgation unfolds and diffuses itself more and more, in proportion as Reason and Appetite profit in various degrees by the things that help them. Parents, then, and others who have this in charge, ought to mould the wax of their children's minds into all the shapes of the Virtues with unwearied diligence, so that naught that is foul in speech or sight may cross the threshold beyond which childhood lies.

XLI. Now according to Aristotle (*Problemata*), τὸ ἔθος ἐστὶ πολλάκις καὶ συνεχῶς ποιεῖν, "Usage consists in a repeated and continuous doing"; and Aristotle also conjoins τὸ ἔθος (Usage) and πολλάκις (often) in his book *On Memory* (ch. 2). So educators will seize and religiously make the most of every opportunity and influence, in order to divert children's hands and minds into virtuous activities, and will early give heed, by destroying the seeds of Vice, to the culture of Virtue. For this time of life is more prone to lust and vice; and so their minds must in good time be habituated to good actions, in order that they may learn to follow not so much what is pleasing to the senses as what is honorable, and, finding that the duties of Virtue which are irksome to begin with become pleasant by practice, they may seek to perform them as being what best befits their rational nature. These efforts will be entirely successful in the case of those who were born εὐφυεῖς.

XLII. But if some there be whose minds are more stubborn and intractable, so far from giving their case up at once as hopeless (a thing Hippocrates deprecates in medicine), let their educators rather address themselves with increased care to the attempt to tame and mitigate the roughness of their natural character. And should they offend in aught, let them be seriously rebuked and blamed. If by this rebuke you call out the blush of shame, all is well and there is every hope that, if unremitting care be shown, the character will improve. If there be no improvement at all, I am afraid that the saying of the comic poet must be held to apply, "He has, in my view, lost all who has lost the sense of shame." And yet we must not abandon all hope even in such a case, nor become utterly despondent. There are sharper remedies, laws and punishments, whereby such souls must be made to submit to restraint; and first of these comes what the Greeks call κολάσεις, forms of chastisement employed for the correction of those who undergo them. And if the

wicked soul is proof against even these and stiffens in perversity with years, then, such being clearly ἀνίατοι, incurable, and past saving even on the score of their own well-being, the last punishments, τιμωρίαι, must be visited on them, and they must be excised like ulcers, subject, of course, to the judgment of those who are vested by Nature or Law with the power of punishment.

XLIII. Where the soul is more delicate, like the pleasant soil of Tibur, sedulously cultivated and softened by habitual practice, it will so receive the seeds of precept and instruction as to yield Teaching's goodly harvest. For, as long as a young person is driven hither and thither by disturbing influences, he will carry a correspondingly uncultivated and rough soul and precepts will avail about as much as a story told to a deaf man; he will neither assent to them nor trust them. Now how this teaching of character should be set about, that is indeed μέγα λίαν αἴτημα, an excessively important question. I will say something on it. In the first place, with reference to things honorable for all mankind and binding on everybody, "Remember to instil in the ears" * the most common and necessary "maxims" of character, as, for example, that there should be no act or omission on man's part which does not show a belief in the existence of God and in His all-ruling Providence; and also such isolated maxims as that the soul is immortal, that no hurt is to be done to any one, that to every one must be rendered what is his, that gratitude must be shown to benefactors—in a word, let Probity and Reverence for Natural Law and zeal to obey it shine out in every act. When imbued with these principles, Reason must be further roused and so developed that, whatever be the business or duty which claims us, it can draw a number of such maxims from these principles, in such sort as never to be in doubt what acts can be honorably done and what not, and also where in the scale of the honorable each act comes. Now, since there are various sorts and conditions of life wherein men differ, in whichever a man is placed he ought so to behave that he plays his part properly in this theater of life (as the Stoics love to put it); that is, that these περιστατικὰ καθήκοντα, crises in duty, are ordered with such discrimination and wisdom that, even if the acts which result be not all absolutely consistent with Probity, nevertheless they agree in one thing, namely, not being inconsistent with it or with Natural Laws.

XLIV. This education of Character can be either Public or Private. In the former case it is governed by public laws, and in the latter it is subject to the authority and will of private persons. The object of the former kind is the welfare and safety of the State; in the latter the advantage of some special Society is primarily regarded. And so Aristotle (*Nic. Eth.*, last ch., § 35) reminds us how the Spartan State was the only one in which the lawgiver paid any attention to educa-

* Præceptum auriculis hoc instillare memento.—Horace, *Ep.* 1, 8, 16.

tion and studies, these being neglected in other States, in many of which every man lived ὡς βούλεται, κυκλωπικῶς θεμιστεύων παίδων ἠδ' ἀλόχου; that is, "at his pleasure, ruling his children and wife after the fashion of the Cyclopes." See also, on this topic, Xenophon, *On the Spartan State* 1; the same writer also eulogizes the Persians on this account at the beginning of his *Cyropædeia*. And on this text Gifanius says, "To-day there is not in Germany or in all Christendom any common discipline and education, other than the Scholastic." But not even the last-named is common as that of Sparta was. I am only too glad, however, to pass over the kind of Teaching and Habituation with which our Scholastic institutions imbue the mind and the Appetite, because the matter is loaded with an infinity of detail and is outside my province. But every one can see that all, whether εὐφυεῖς or ἀφυεῖς, well- or ill-endowed by Nature, are promiscuously crowded into one cohort; and the wickedness and shamelessness of the ἀφυεῖς are often fostered in various ways, much to both public and private loss, while the good parts of the εὐφυεῖς are not less often debased and destroyed by the savagery, sloth, ignorance and obtuseness of schoolmasters of Orbilius' type. The beneficent results, then, of Instruction, Teaching, and Education being what they are in arousing the natural fires and in perfecting the Intellect and Appetites, those persons render to the State a highly useful and necessary service who do not shrink from this tiresome toil but spend all their days in the formation and guidance of those of tender years. This being, indeed, a burden and duty which very few are fitted to sustain and bear, so much the more highly ought they to be esteemed, and their labors encouraged and rewarded by better pay, who not only know how to roll this Sisyphus' stone, but also do not shrink from the task; so much so, that their claim upon the gratitude of the State is only less than that of those who give their patronage to teachers and provide them with not necessaries alone, but amenities also, and rather add to their salaries than cut them down or defer their payment, the intent of their zeal and care being that these seminaries of Church and State may be as well ordered and as assiduously tended as possible. But my hand must quit the tablets.

With God's Help.

DISSERTATION THE SECOND.

Of the Law of Nations.

I. Not only has Nature provided its own Law for men, whereby, as if by a world-wide chain, they are bound to one another in virtue of being men, but mankind has itself also laid down various positive laws for its own guidance, not merely those by which in every State the government binds its subjects to itself or by which these bind themselves to one another, but also those which the human race, divided up as it is into independent peoples and different States, employs as a common bond of obligation; and peoples of different forms of government and of different size lie under the control of these rules, which depend for their efficacy upon mutual good faith. " Custom and human necessity compelled the people of mankind to adopt certain Laws for themselves " (*Inst.* 1, 2, 1). Now these words are spoken of the Law of Nations properly so called, with which it is our purpose to deal here; and so the principle indicated, and the various examples there given under it, are ill adapted to Natural Law, as Bachov, in his *Commentaries,* has correctly observed, following Wesenbec.

II. Now the Law of Nations is founded on the agreement of Nations. For one State has no authority over another, nor one free people over another; nor is one of them under liability to another of them, and much less are several free peoples and States subordinate to some one power—but each of them has its own αὐτονομία and αὐτοκρατορία, independence and self-rule. And so, if they are united to one another by any arbitrary Law, to which all those who are so associated must render obedience, that Law can not but be set up by Agreement. For, just as equal can have no right and power over equal, nor private person over private person, save such as may come from agreement, so also free peoples and races are joined together just as private persons are by agreements, and they are in no other way capable of a positive Law which shall operate between them with a common binding effect. (*Dig.* 4, 8, 4.)

III. Two points deserve to be made and carefully noted. The first is that it is by Agreement after the manner of private individuals that the Law of Nations is set up by free peoples. The second is that by means of that Law they are formed into a Society and are bound to one another. For if there be any Law observed among many peoples,

but no obligation springing therefrom obtains among them so that by its bond they are constrained into a Society and kept therein, that is no Law of Nations at all and ought not to be so called, but it is a Civil Law common to many peoples and belonging to them as individual peoples. Now Grotius saw this rightly and pointed it out; but here and there he falls in with the common but quite unjustified usage and calls that Law the Civil Law of many peoples, or a kind of Law of Nations. (See *De jure belli ac pacis,* bk. 2, ch. 8, n. 7.) " The peoples of Germany," says he, " have vested treasure-trove and other *ἀδέσποτα,* things without a private owner, in their Prince. And that is now a common rule, and a kind of Law of Nations, for it is observed alike in Germany and France and England and Spain and Denmark." But Grotius himself sets out the true nature of that Law more correctly than any one else in bk. 2, ch. 8, n. 1. These are his words:

" But this is not the Law of Nations properly so called, for it does not appertain to the mutual society of nations amongst themselves, but to the tranquillity of each people. It might, therefore, be changed by one people without consulting others. Also it might happen that, in different places and at different times, very different usages and, thus, a different Law of Nations (improperly so called) might be introduced. This we see did in fact happen, from the time when the German nations invaded nearly the whole of Europe. For as the laws of Greece formerly, so now German institutions are everywhere received and are still in authority."

See also Grotius, chapter mentioned, n. 26. And in bk. 2, ch. 3, n. 5, he unfolds the nature of the Law of Nations as follows, saying that it has not the force of agreement between peoples, but that it is a Civil Law of many peoples, of a distributed kind, so that it can be rejected by individuals. Selden also calls this the Civil or Domestic Law of some or many peoples (*De mare clauso,* bk. 1, ch. 3, and elsewhere in several places).

IV. It is, then, clear that the Law of Nations in the proper sense is a species of Arbitrary Law, and a very important species too, and that it is quite wrong to confuse the Law of Nations with the Law of Nature. After Ulpian's announcement of his discovery that there is a Natural Law, not peculiar to mankind, but common to all animals of land or sea, and even to birds (*Dig.* 1, 1, 1, 3), he goes on in § 4 to say of the Law of Nations: " The Law of Nations is the Law employed by the peoples of mankind. The distinction between it and Natural Law is easily understood; for the latter is common to all animals, whereas the former is common to men alone among one another." Gaius' treatment of the matter is more cautious; in *Dig.* 1, 1, 9 he gives a satisfactory description of Natural Law, though wrongly giving it the label, Law of Nations, and says, " What Natural Reason has established

among all men is everywhere equally observed among them and is called the Law of Nations, as if it were a Law which all nations use." Now, I admit that there are certain κοινὰ τῶν ἀνθρώπων δίκαια, laws common to men, as Thucydides, Polybius and others tell us, and that there is a "Common Law in the public place of the universe and engraved on the tables of Nature," as Tertullian says (*De corona militis*), the obligation of which is binding on all men in virtue of their being men, and which all men, and peoples too, must accept, in such sort that it is not open to any of them to withdraw themselves from the operation of that Natural Law, or to destroy it; still, it is improper to use the term Law of Nations promiscuously of this Law of Nature; so to do leads to many errors and confuses varieties of Law which are entirely distinct.

V. Means for covering this blemish were sought and found in a division of the Law of Nations into the Primitive or Primary variety and the Secondary. By the former the Law of Nature is meant, and by the latter the Law of Nations proper. Hence Vinnius has the following comment in his n. 2 on *Inst.* 1, 2, 2:

"In this place the accepted distinction between the Primary and Secondary Law of Nature is confirmed. It is not, however, free from fault, for Tribonian does not lay down the distinction over-clearly. Now the Primary branch was not thought out and introduced by man, but is inborn in us, just as those simple notions from which it issues are divinely implanted in our minds and engraven on our hearts. But the Secondary branch is of human invention, implying considerable mental effort and a good deal of comparison, and is thought out to meet the needs of a common course of life and to conserve the society of nations. So the cause of this Law is in part Usage and Need, as Aristotle testifies (*Politics* 1)."

In the same way Wesenbec had previously declared that the Law of Nations was to be divided into the Law of Reason (*rationis*) and the Law of Reasoning (*ratiocinationis*). And so also Grotius, in order to make some addition to current terminology, speaks at times of the Voluntary Law of Nations; and in his *De jure belli ac pacis* (bk. 2, ch. 13, n. 15) he pleonastically speaks of the Instituted (*constitutum*) Law of Nations; but as a matter of fact the Law of Nations is nothing else than Arbitrary, Voluntary, or Instituted. And that explains what Bœcler writes in his commentary on Grotius' *De jure belli ac pacis*, bk. 2, ch. 4, n. 9: "I can not disguise the fact that I do not think very much of that current but inaccurate language whereby a thing is said to be both of the Law of Nature and of the Voluntary Law of Nations." And although Joannes Corasius had accepted the distinction into Primitive and Secondary Law, and had in his work *De jure civili in artem redigendo* affirmed the former to be common to the brutes and to man, yet after more exact examination he condemned it

in his *Juris civilis miscellanea* and adjudged it worthy of Pluto's brood. Herein he agreed with Albertus Bolognetus, Joachimus Mynsingerus, Franciscus Connanus, Hugo Donellus, Jacobus Cujacius, Franciscus Hottomanus and others. (See Selden, *De jure naturæ et gentium juxta disciplinam Hebræorum,* bk. 1, ch. 5, p. 27, Strassburg edition.)

VI. The Roman jurists did not draw an exact distinction between the Law of Nations proper and the Law of Nature, from which it differs considerably—a point of great importance in the philosophy of Law—but rather confused the two; and this accounts for their subjecting many matters to the obligation of the Law of Nations, about no one of which there is even to-day any agreement whether it ought to be referred to the Law of Nature or to the Law of Nations properly so called. I will name a few out of the many things that show this. For although it might be worth while carefully to consider all the texts of the Roman Civil Law which mention the Law of Nations, still the examination of a few will suffice to enable me to keep my word. Thus, Hermogenianus (*Dig.* 1, 1, 5) and Justinian (*Inst.* 1, 2, 2) attribute to the Law of Nations the introduction of War, Captivity, Slavery, varieties of Ownership, the erection of buildings, and the creation of commercial intercourse and of the contracts of Sale and Hire and other obligations. Conring imputes this hodge-podge of illustrations, not to the old jurists, but to the carelessness of Tribonian (*Disputatio de jure,* th. 24). I think it improbable either that in this matter Hermogenianus could blunder as badly as Ulpian did in his description of Natural Law or that Tribonian really took the passage as it stands from Hermogenianus' *Epitomæ juris,* bk. 1; for although Tribonian often left his imprint on the texts of other jurists, yet it would be hard and over-rash to try to father on Tribonian all the incorrect and wild and inept sayings of other people. But Bachov is right in his criticism that the examples given can not be referred to one and the same branch of the Law of Nations, Bachov himself accepting the division of that Law into Primary and Secondary. Thus Wars and certain of their consequences, such as the enslaving of captives, belong to the Law of Nations in the proper sense; Grotius deals at length with these (*De jure belli ac pacis,* bk. 3). It is accepted that Ownership and the different varieties of it, at any rate when generally considered, must be referred to the Law of Nature, as is clearly shown by Bœcler in his comment on Grotius' *De jure belli ac pacis,* bk. 2, ch. 2, and also by myself at length on the same chapter. Commercial intercourse and the Contracts in vogue among men belong to the same Law, so far as they are governed by the laws of Corrective Justice; there ought to be no mistake, fraud, unlawful force, and fear about them, but, contrariwise, they ought to embody good faith and fairness. Surely the creation of buildings depends entirely on human discretion, and not on any obligation of the Law of Nature. The

Fenni are said to have had no homes, and other ancient Germans would open up caverns under ground and cover them up on the top with a mass of filth, as a shelter from the cold and a storehouse for their harvest (Tacitus, *Germania*). In the same way, this folk and the Numidians and Scythians and other ἀμαξοθίοι, wagon-using, peoples chose in olden time to take wagons about instead of houses and hide in these, or live under tents or skins, without any breach of the Law of Nature. By degrees, after men had added to the comforts of civilized life by the building of homes, a more cultivated style of living set in, but so that no obligation so to do arose therefrom among the various peoples.

VII. Let us add to this some other isolated matters which, on the hypothesis of the Roman jurists, belong to the Law of Nations. In *Dig.* 18, 1, 1, 2, it is said that Sale belongs to the Law of Nations. And in *Dig.* 18, 1, 51, the sea-shore is considered to be free to all persons under the Law of Nations. In *Dig.* 19, 2, 1, the jurist says that the contract of Hire is natural and common to all nations. In *Dig.* 16, 3, 31, Tryphoninus raises the following question: A man charged with a capital offense has deposited a hundred *aurei* with you and is deported; his property is sold by public authority; ought the money to be restored to him or be handed to the state official? Among other arguments which Tryphoninus uses, he says: "If we take account only of the Law of Nature and of Nations, the money ought to be restored to the depositor; but if we go by the Civil Law and ordinance, it ought in preference to be handed to the public authorities." Paulus (*Dig.* 50, 17, 84, 1) says that a man who ought by the Law of Nations to give us something because of a promise he has made us, is under a natural obligation. The same jurist says (*Dig.* 6, 1, 23, pr.) that a real action is available to one who has acquired ownership either by the Law of Nations or by the Civil Law. "I think that by the Law of Nations things can be recovered by condiction from those in wrongful possession thereof"; so says Marcianus (*Dig.* 25, 2, 25). There are things of which we acquire ownership by the Law of Nations, and Gaius (*Dig.* 41, 1, 1) says this is because that Law is quite rightly observed among men on grounds of natural reasonableness. The same jurist (*Dig.* 41, 1, 5, 7) says that things captured from the enemy pass at once to the captor by the Law of Nations. And he also gives an opinion that whatever a river adds to our land by alluvion, becomes ours by the Law of Nations. In *Dig.* 41, 1 : 7 (1 and 5), he declares it part of the Law of Nations that the new bed of a river should take on the same legal attributes as the river itself; that is, should become public. And in *Dig.* 41, 1, 95, he lays it down that things which become ours by delivery do so by the Law of Nations, there being nothing so consonant with natural equity as that the intent of an owner to transfer his property to another should be effectuated. §§ 1, 4, 5, 11, 12 and 20 of *Inst.* 2, 1 may be

added. Ulpian remarks in *Dig.* 2, 14, 7, pr., that by the Law of Nations some agreements give a cause of action and others a plea in defense. To the former class he refers the nominate contracts and also, if they be supported by consideration, the innominate contracts; to the latter class he refers naked pacts. The same jurist lays it down that a formal discharge (*Acceptilatio*) operates by the Law of Nations (*Dig.* 46, 4, 8, 4), because (I take it) it possesses the force and bindingness of deliberate assent. If your surety pays, on his own account, money which is not owed and which he has in error promised to pay, he can recover the amount from the other party, since the money which he paid was by the Law of Nations not due; that is the opinion given by Celsus (*Dig.* 12, 6, 47). Freedom is part of Natural Law, and Slavery was introduced by the Law of Nations, says Tryphoninus (*Dig.* 12, 6, 64). Slaves become so by the Law of Nations, that is, when taken captive, says Justinian (*Inst.* 1, 3, 4); and in *Inst.* 1, 5, pr., Slavery is stated to have made its inroads on Freedom, by the Law of Nations. Further, in *Inst.* 1, 8, 1 the power of masters over their slaves is traced to the Law of Nations; for, says Justinian, we can quite rightly see that among all nations masters have had the power of life and death over their slaves.

VIII. I will not pile up more of this kind, for this is enough to show that the Roman jurists use and abuse the term Law of Nations in a promiscuous and confused way, to denote at one time the Law of Nature and at another the Law of Nations proper, but that they generally mean by it the Law of Nature. It is, however, foreign to our present purpose to enquire whether all those things which they call Law of Nations and refer thither, such as the sea, sea-shore, river-bed and the like, are part of Natural Law. Meanwhile Grotius may be consulted and read, *De jure belli ac pacis,* bk. 2, ch. 8; he there makes a minute examination of the various things that are commonly said to be acquired by the Law of Nations. But as to certain effects of War, namely, captivity, lawful slavery and the transfer to the captor of goods taken from the enemy, these come from the Law of Nations proper, as will in due course be learned. So far, however, is the power of life and death—which among the Romans masters exercised over their slaves—from being consonant with the Law of Nations, that it is rather condemned thereby; Grotius proves this at some length (*De jure belli ac pacis,* bk. 2, ch. 5, n. 28). But if what Justinian meant was only that masters do among many nations exercise a power of life and death over their slaves, that would be part of the Civil Law of many nations. And if you say that by the Law of Nations proper the power of masters over those who had become slaves by capture or purchase increased to that pitch of severity, it would be correct to take that to mean that it had become usual for such conduct to be indulged in with impunity; but

Grotius rightly declares, in the place already quoted, that indulgence with impunity in any given conduct is wrongly called Law.

IX. After this explanation of the ill-assorted tangle of the jurists, let us return to our course. We have said that the Law of Nations, properly so called, is a species of Arbitrary Law, and this will in due course be more clearly shown. Now I mentioned above that the Law of Nations, like the Law which prevails among private individuals, was constituted by agreement; but this will not commend itself to some. for by some, as by Grotius in the title-page of his work *De jure belli ac pacis,* it is reckoned part of Public Law. In order to resolve this doubt, it must be firmly maintained and remarked that the same thing is often endowed with different qualities, according to differences in the point of view, and that correspondingly different names are given it. So the Law is called Public to which the State adds a sanction, even although private matters are concerned, regard being paid rather to the source from which the sanction issues than to matter or object; from this latter standpoint the Law in question would be Private. So also the Law of Nations is Private, if the situation be viewed as one in which nations are in agreement with one another and if you consider the effect thus mutually produced. But in so far as it is about the public affairs of its commonweal that each free nation enters into agreements of that kind, the same Law of Nations can be called Public. Nay, if you look at the subject itself, to wit, a State concretely regarded making agreements with another State, and do not consider it in its relation to the other State that is a party to these agreements, except so far as serves to distinguish the agreements of the latter State from the subjects of the contracting State and their agreements, on that score the Law of Nations will rightly be called Public.

X. I said that the binding force of the Law of Nations depends on agreements. "An agreement," says Aristotle (*Rhetoric* 1, ch. 15), "is a private law." And this name of Law the jurists also do not deny to agreements (*Dig.* 18, 3, the whole title; *Cod.* 8, 34, whole; *Dig.* 8, 4, 13, pr.). According to Ulpian (*Dig.* 2, 14, 1, 2), an agreement is the consenting of two or more to the same effect. That consenting may take place in more than one way; it may be Express, or Tacit, or Presumptive. And so Labeo says that a contract may be formed *re,* by act, and also tacitly (*Dig.* 2, 14, 2). And Julian's question (*Dig.* 1, 3, 32) points in the same direction: "What difference does it make whether the people signifies its assent by a vote or by acts and deeds?" The agreements, accordingly, upon which the Law of Nations is based are either Express or Tacit, so that herein consent is rendered abundantly certain and clear by means either of Presumptions or of more cogent indications. Now the Law of Nations must be classified into several species; so let us first show what these are and consider what

species are based on express agreements and what on tacit agreements, even though this involves shelving for the present some few matters which relate to the genus itself.

XI. When I say "Law of Nations," I am thinking of those nations each of which is marked off and distinguished from the rest by its own separate government, whether of one person or many or of the whole people. I do not propose any fixed number of such nations, nor define the number within which the obligation and observance of that Law extends. Least of all do I wish to suggest that all nations of the whole globe have entered by consent into any such common Arbitrary Law, with the intention of being mutually bound thereby. Consistently herewith, Grotius (*De jure belli ac pacis,* bk. 1, ch. 1, n. 14), after distinguishing the Law of Nations from Natural Law, goes on to say,

"Law in a wider sphere is the Law of Nations, that Law which has received an obligatory force from the will of all nations or of many. I add 'or of many' because scarce any law, except Natural Law (which also is often called Law of Nations), is found common to all nations. Indeed, that is often Law of Nations in one part of the world, which is not so in another, as we shall show when we come to speak of captivity and postliminy."

Now not all nations are known; so how can there be any manifestation of the consent, whether express or tacit, and intent of all of them about an arbitrary matter? Indeed, I do not think that even all known nations are under the obligation of this Law. And although there may be certain principles of a common Law of Nations which bind all the more cultured of known peoples, still I will not make any general assertion to that effect about any Law of Nations. (See Selden, *De jure naturæ et gentium juxta disciplinam Hebræorum,* bk. 1, ch. 6, p. 77, Strassburg edition, for the threefold meaning and interpretation of "all nations.")

XII. It is, then, enough for my purpose that "Nations," in the Law of Nations considered generally, means "many Nations," without any definite number being fixed, even if there be but two; for this justifies the use of the plural number. Conring supports me in this matter, saying (*Disputatio de legibus,* th. 24):

"The Law of Nations is that which many nations have instituted among themselves for their own use, not at random or by imitation [*sc.* adapted to individual needs] one of the other, but as if by agreement. I say 'many' in the same way in which grammarians oppose the plural to the singular number, and without any suggestion that that alone deserves the name of Law of Nations which operates between numerous States or the majority of States. Thus, there is at the present day a special arrangement between the Spanish and the Dutch that a prisoner of war may ransom himself from his captor with one month's

pay. I do not see why this has less claim to be called Law of Nations than the old rule whereby prisoners of war became the slaves of their captors. Each of these is a law of Nations, albeit the former only of two nations and the latter of many."

This view has also the support of the English jurist Richard Zouche, who, in his book entitled *Jus inter gentes* (part 1, § 1), makes the Law of Nations twofold: one part he derives from a common assent; and of the other he says, "Furthermore, besides common customs, anything upon which single nations agree with other single nations, for example by compacts, conventions, and treaties, must also be deemed to be law between nations."

XIII. The Law of Nations is also often styled Fecial Law, and what we have collected on this subject from the writings of the ancients will be of no little service in illustration of the argument. The Fecials, Φητιαλεῖς, took their name, according to Festus, from *facere,* because the due making (*facere*) of peace and war was entrusted to them. There was a college entirely composed of Fecials, just as there was of Augurs and Pontiffs.

"Numa instituted several other sacred orders, two of which I shall mention, the *Salii* and *Fecials,* which afford particular proofs of his piety. The Fecials were guardians of the peace and had a name expressive of their office; they were to decide the differences between the parties by reason, and not suffer them to go to war till all hopes of justice were lost. For they call that a peace which puts an end to strife not by mutual violence but by negotiation. The Roman Fecials were often despatched to such nations as had injured the Romans to demand satisfaction and redress. If they rejected this demand, the Fecials called the gods to witness with imprecations against themselves and their country if their demand of redress was not just. And so they declared war. But if the Fecials interposed, or refused their sanction, it was not lawful for any Roman soldier, nor even for the King himself, to begin hostilities. The King could begin a war only with their approbation as the proper judges whether it was just; and when that was given, it was for him to deliberate on the proper means of carrying on the war." This is taken from Plutarch's *Numa;* and the same writer also says in his *Camillus,* "These Fecials were appointed by Numa, the mildest and justest of Kings, to be conservators of peace as well as judges to give sanction to the just causes of war."

To this may be added what the very diligent writer, Dionysius of Halicarnassus, says (bk. 2):

"It would be a lengthy business to describe all the duties of the Fecials, but the following is a summary. To see that the Romans did not make an unjust (*injustum*) war on any allied State. If any such State had been the first to infringe the treaty of alliance, to send an

embassage and claim redress verbally to begin with. If this demand was contemned, then to declare war. Also, if any complaints were made by any such State that a wrong had been done to it in violation of the treaty, to enquire into the matter; and, if a wrong was discovered, to have the guilty parties arrested and surrender them to the injured party. Also to adjudge on wrongs done to embassies and to see that the terms of treaties were complied with. Also to arrange a peace or, if one had been made without observance of due formalities, to annul it. Further, to take cognizance of anything done by commanders in violation of the oath and to make expiation therefor."

And the following passage from Pomponius Lætus (*De magistratibus sacerdotiis et juris peritis ac legibus Romanorum,* ch. 9) is worth a place here; he was, in the judgment of Politian and Lilius Gyraldus and Voss, the most diligent investigator of Roman antiquities, and would be affected even to tears whenever a marble was dug up from the ruins of the City. "The Fecials," says he, "were so called because they had in charge public good faith (*fides*) among nations. It was through their instrumentality that a just (*justum*) war could be undertaken, and that honorable and peaceful relations were reëstablished by treaty. Numa is credited with instituting them, on the occasion of his declaration of war against Fidenæ. Before war was begun, they were sent to demand redress and, if their demand failed, they declared war. One of them, elected to be Pater Patratus by the Fecials themselves, wearing his sacred robes, made his way to the authors of the wrong. Before entering their city he would address certain imprecations to the doorkeeper or other person whom he met on the way. Then, going into the forum, he unfolds the reason of his coming and gives them thirty days in which to deliberate. If on the expiry of that period the object of his mission is still unattained, he invoked the gods above and the gods below, departs and reports the matter to the Senate. And after all just and pious requisites had been carried through in the Senate, the Fecial would declare war. To violate the sacredness of the Fecials was an offense against religion (*nefas*). And when Fabius committed such violation the city of Rome was overthrown by the Senonian Gauls. They received the name Fecials from their making (*facere*) or striking (*ferire*) a treaty: and the Pater Patratus was so called from *patrare,* that is, to sanction a treaty which the Fecials had made; for, according to some, his preëminence was limited to treaty-making."

XIV. To the Fecials, then, was entrusted the knowledge (*disciplina*) of peace and war, which is the phrase in which Carolus Sigonius (*De antiquo jure civium Romanorum,* bk. 1, ch. 19) sums up their duties. And they cultivated that knowledge with great care and diligence; so that they not only, in large part, collected the Laws of Nations, and set them down in writing, but they also interpreted the same and

won for themselves fame and authority in this special branch of Jurisprudence. Cicero, accordingly, says (*Offices,* bk. 1), " The preconditions of a just war were most scrupulously laid down in the Fecial Law of Rome." And in the seventh against Verres he says, " Here we have a man educated at the hands of the Fecials, an outstanding man, upright and assiduous in his regard for the public bonds of treaties." And elsewhere the same writer remarks how excellent is knowledge in the treaties, pacts, and bargains of peoples, kings and other nations, and, in a word, to be trained in the whole Law of Peace and War. In the same writer's *Laws,* bk. 2, this enactment is preserved: " Of treaties, peace, war, and truces, let the Fecials be spokesmen (that is, ambassadors) and judges." And a little further on in the same book: " And as concerns the Law of War—alike in undertaking war and in prosecuting it and in ending it—Law is of the first importance, and so is Good Faith; and of these we by statute constitute the Fecials the public interpreters." This is confirmed by Marcus Terentius Varro, Pomponius, Festus, and Nonius. And, indeed, if all that has come down to us in connection with these monuments had been regret at the loss of them, the matters in question could distinctly and clearly have been learned from the Fecial Law itself. Albericus Gentilis, accordingly, does not hesitate to declare that the Fecials were the guardians not only of treaties, peace, war, embassies, but also of the other departments of the Law of Nations in regard of foreigners (*De jure belli,* bk. 1, ch. 1, n. 5). To him may be added Rosinus (*Antiquitates Romanæ,* bk. 3, ch. 21); Bodin (*De republica,* bk. 5, last ch.); and others who have written on military matters and the Law and study thereof, such as Spelman in his *Aspidologia,* Upton, Nicolaus Reusner, Gabriel Naudé, Valturius, Balthazar Ayala, Valtrinus, Franciscus Patricius, and Justus Lipsius in his *Poliorcetica.*

XV. The solemn rites and formulæ, employed by the Fecials in the discharge of their various tasks, are evidence of the scrupulous and religious exactitude with which they performed their office. I will give a few illustrations out of many. Cincius wrote in his *De re militari,* bk. 3 (so we are told by Gellius, bk. 16, ch. 4), that the Roman Fecial, when declaring war on the enemy and hurling his weapon into their territory, used these words:

" Whereas the Hermundulan People and the men of the Hermundulan People have made war on the Roman People and have done a wrong; and whereas the Roman People has ordained war against the Hermundulan People and men: I therefore and the Roman People declare and make war on the Hermundulan People and men."

Concerning this solemnity, Servius has the following in his commentary on Vergil's line,

Tunc certare odiis, tunc res rapuisse licebit.

(Then strife and hatred and plunder will become permissible.—Æneid x, 14.)

" Ancus Martius," says he, " saw the Roman People inflamed with the lust of war and often making war on other nations without any just ground, and realized that this led to much danger. So he sent to the Equiculan People and adopted the Fecial laws wherein war was declared in the way described by Livy in the case of the Albans. For if men or animals had been lifted from the Roman People by another nation, the Pater Patratus set out with the Fecials, that is, priests who have in charge the making (*facere*) of treaties; and, standing before the boundary, he proclaimed in a loud voice the cause of the war and, if the enemy persisted in the refusal to make amends or restitution or to give up the wrong-doers, he hurled on them his spear. This was the beginning of the war, and the violence of war was now permissible."

Other Fecial formulas of this kind are given in Grotius' *De jure belli ac pacis* (bk. 3, ch. 3, n. 7). Livy (bk. 9) furnishes the following example of a surrender made by the Fecials:

" The Fecials, who went before, on coming to the gate, ordered the sureties of the peace (that is, the peace agreed on at the Caudine Forks) to be stripped of their clothes and their hands to be tied behind their backs. As the apparitor was binding Postumius in a light manner, out of respect for his dignity, he said, ' Why do you not draw the cord tight, that the surrender may be regularly performed? ' Then, when they came into the assembly of the Samnites, and to the tribunal of Pontius, Aulus Cornelius Arvina, a Fecial, pronounced these words: ' Forasmuch as these men, here present, without orders from the Roman People, the Quirites, entered into suretyship that a treaty should be made, and have thereby rendered themselves criminal; now, in order that the Roman People may be freed from the crime of impiety, I here surrender these men into your hands.' "

And when a treaty was being made, then certain words were added by Fecial Law; so Suetonius shows in his *Claudius*, ch. 25, where he says, " He strikes a treaty with the Kings in the Forum, slaying a sow and employing the prefatory words of the old Fecials." What the nature of these prefatory words was, is made clear by the following passage from Livy, who, when dealing with the treaty struck between Tullus Hostilius and the Albans, says (bk. 1):

" Different treaties are made on different terms, but they are all concluded in the same general method. We have heard that it was then concluded as follows, nor is there a more ancient record of any treaty. A Fecial asked King Tullus thus: ' Dost thou command me, O King, to conclude a treaty with the Pater Patratus of the Alban People? ' After the King had given command, he said, ' I demand vervain of thee, O King.' To which the King replied, ' Take some that is pure.' The Fecial brought a pure blade of grass from the citadel; again he asked the King thus: ' Dost thou appoint me, O King, the royal delegate of

the Roman People, the Quirites, including my vessels and attendants?' The King answered, 'That which may be done without detriment to me and to the Roman People, the Quirites, I do.' The Fecial was M. Valerius, who appointed Sp. Fusius Pater Patratus, touching his head and hair with vervain. (The Pater Patratus is appointed *ad jusjurandum patrandum,* that is, to ratify the treaty); and he goes through it in a great many words, which, being expressed in a long, set form, it is not worth while to repeat. After setting forth the conditions, he says, 'Hear, O Jupiter; hear, O Pater Patratus of the Alban People; and, ye Alban People, hear. From those conditions, from first to last, as they have been recited openly from those tablets or wax without wicked fraud, and as they have been most correctly understood here this day—from those conditions the Roman People will not be the first to swerve. If they first swerve by public concert, by wicked fraud, on that day do thou, O Jupiter, so strike the Roman People, as I shall here this day strike this swine; and do thou strike them so much the more as thou art more able and more powerful.' When he said this, he struck the swine with a flint stone."

The same author has touched on this rite in two other places. In bk. 9 in this fashion: "For what occasion would there be, either for sureties or for hostages, where the ratification is performed by the imprecation, 'That whichever nation shall be the cause of the said terms being violated, may Jupiter strike that nation in like manner as the swine is struck by the Fecials'?" And in bk. 30: "The Fecials being ordered to go into Africa to strike the treaty, at their desire the Senate passed a decree that they should take with them flint stones of their own, and vervain of their own; that the Roman prætor should command them to strike the treaty, and that they should demand of him herbs. The kind of herb usually given to the Fecials is taken from the Capitol."

Cœlius Rhodiginus also gives a description of another ritual for treaty-making (*Lectiones antiquæ,* bk. 21, ch. 15):

"The Fecial took a stone in his hand, after the Senate had come to a decision about the treaty, and spake as follows: 'If I uprightly and without wicked fraud make this treaty and take this oath, may the gods grant me all blessedness; but if I either do or think anything of a different kind, may all other persons be immune from hurt and I alone perish, as this stone will drop from my hand.' And without saying more, he knocked the stone down with his hand."

Thus much on this topic.

XVI. This will help us in various matters, including the right division of the Law of Nations and explanation of its species. Before entering on this investigation, a general definition of the Law of Nations will be repeated from an earlier part of this dissertation, lest any reader shall, in the course of this argument, feel the lack of so necessary a

thing. The Law of Nations, then, is a law developed by the consent or agreement, either expressly or tacitly given, of many free nations, whereby for the sake of utility they are mutually bound to one another. Some one may tell me that I am wasting my toil in elaborating this definition while the question is still undecided whether any Law of Nations exists and operates at all. I adverted to this doubt at the very threshold of this debating-hall; the better and more amply to satisfy it a division of the Law of Nations must first be established, and then, after an examination of its various species and heads, we will enter into a discussion with those who hold the pernicious doctrine that there is absolutely no such thing as a Law of Nations.

XVII. Let us now advance to the division of the Law of Nations, a topic the treatment of which by others is not only ambiguous, but also tainted with error. I hope, however, that we shall overcome these difficulties more easily than the birds passed over the Cimbric foss in Phrygia, a thing which Antigonus Carystius, in his *Commentaria historiarum mirabilium,* declared impossible for them. We considered above that division of the Law of Nations into Primæval, or Primary, and Secondary, and refuted and rejected it. And we do not change our attitude. Nor does it assist in the division of this Law to call the first-named part Voluntary, because no Law of Nations properly so called is anything else than a product of the free will of the contracting peoples. Grotius makes frequent mention of an External Law of Nations and contrasts it with an Internal Law. It is the operation of the External which manifests itself not only in the impunity of the act but in the protection afforded by the tribunals (*De jure belli ac pacis,* bk. 3, ch. 7, n. 7) ; the Internal is that which can be upheld in the forum of conscience (Grotius, *De jure belli ac pacis,* bk. 3, ch. 10, onwards).

XVIII. John Selden, that honor of Britain (with which praise Grotius decorates him in his *Annotations* to the *De jure belli ac pacis,* bk. 2, ch. 2, n. 2), clearly employs a new division of the Law of Nations, when, both in his *De jure naturæ et gentium juxta disciplinam Hebræorum* and in his *Mare clausum,* he divides it into Imperative and Intervenient (*interveniens*). The former he explains as being what has been prescribed by the Deity; the latter, what was introduced by the Hebrews themselves (*De jure naturæ et gentium juxta disciplinam Hebræorum,* bk. 2, ch. 5, p. 115, Argentor's edition). But with all respect for so great a man, even here truth must be allowed to prevail, and dissimulation not be indulged in. I hold, then, that neither of these can be referred to the Law of Nations in the proper sense, as Selden discourses on each of them. Bœcler saw this before we did, and pointed it out, writing as follows in his notes to Grotius' bk. 1, ch. 1, n. 14, p. 169:

" Selden's Law of Nations, Imperative and Intervenient, has next to no operation outside the case of the Hebrew learning (*disciplina*).

For it is noteworthy that Selden was not, in his work, treating the Law of Nature absolutely, but according to the learning of the Hebrews; and in the same way he did not describe the Law of Nations absolutely, dismissing all individual States from his contemplation, but confined himself within the limits of the practice of the Jewish State and the learning of the Hebrews. Granting, then, that God laid down some laws for the guidance of the Hebrews in their intercourse with other nations, surely these are not to be referred to the Law of Nations, but to the voluntary Divine Law. For the Law of Nations, truly so called, is that which, by the agreement or consent of free nations, obtains obligatory force among them. But Selden's Imperative Law of Nations drew its sanction from Divine Laws whereby God intended to bind His peculiar people to Himself as regards the performance of certain duties to other nations and the way in which they were to live among them; so that these other nations did of their free choice join with the Hebrews or others in laying down these laws for themselves as a Law of Nations, but they were also the external object of those laws whereby God, the Lawgiver, intended intercourse with His Hebrews to be carried on in a certain defined way, and to that end laid down these Civil Laws for them."

XIX. Nor can what Selden calls the Intervenient Law of Nations defend its name. I will give a few examples out of many which show this. We find in Leviticus a law about the uncleanness of a man who is suffering from a discharge of seed, and of a woman who is suffering from a discharge of blood. The teachers of the Jews extended this law to all the Gentiles, all of whom were without distinction to be deemed unclean and so to communicate that uncleanness to others by personal contact, just as if they were suffering from a perpetual discharge of seed or blood. Selden refers this interpretation of the Divine voluntary law which they thus deduced to the Intervenient Law of Nations (*De jure naturæ et gentium juxta disciplinam Hebræorum*, bk. 2, ch. 5, p. 115, onwards). Any one can see how inept this is. This distinction, then, may serve Selden's purpose and particular case; but it must not impose on any one as accurate when brought to the file and ἀκρίβεια, precision, of truth.

XX. Again, the Jews held that the Divine injunction, Thou shalt not make to thyself any graven image (*Deuteronomy* 26, v. 1), bound also those whom they called the proselytes of the household, and this through fear of a lapse into idolatry; Selden (bk. 2, ch. 6, pr.) refers this to the Intervenient Law of Nations, which here indeed was such as to be reënacted by the Civil Law for the governance of those proselytes (bk. 2, ch. 6, at end). And he notes the following in bk. 4, ch. 2, p. 493, of the same work: If a Hebrew accidentally slew a proselyte of the household, free or slave, he had to flee to a city of refuge or place

of asylum; but if a proselyte accidentally slew a Hebrew, there was no privilege of asylum for him. If, however, he chanced to kill a proselyte of his own class, free or slave, he enjoyed the privilege of asylum; while, if another Gentile, who had not become a proselyte of the household, killed a Gentile of his own class, the right of asylum was denied him. So, also, less indulgence was shown to proselytes or Gentiles living in the Hebrew Commonwealth, at the season of harvest or vintage, than to the Hebrews, as regards gathering the ears of corn or eating bunches of grapes (Selden, bk. 6, ch. 2, p. 700, onwards). And other such-like things may be read there in various places. All of these, and what Selden adds to them, he names and classifies under the Intervenient Law of Nations; so that the customs and rules which regulated the life of the Gentiles or proselytes living in the Hebrew Commonwealth, and by which they were marked off from those of Hebrew origin, formed in virtue thereof an Intervenient Law of Nations.

XXI. But, I ask, what is the nature of this Law of Nations which a lawgiver may sanction for certain foreigners who subject themselves to some Commonwealth either permanently or up to a given time, or which is even dictated by the indigenous inhabitants themselves, so far as it may suit them to live with the foreigners whom they have received under their sway either permanently or for a given time? The foreigners so admitted certainly do not form a nation, and especially a free nation, possessing power to make compacts at their discretion and of their own counsel with another nation equally free in this respect so that each shall be bound to the other. In truth Selden already clearly admits, as the circumstances themselves abundantly confirm, that the proselytes of the household were under the sway of the Hebrews; and in various places in the last book of the same work he shows that they could be punished by a decree of a Hebrew court. So far were they from being a free nation possessed of the power to join with others in the creation of a binding Law of Nations, that in an almost infinite number of matters their place and condition in the Hebrew Commonwealth were far inferior to those of the Hebrews themselves. I am therefore equally dissatisfied with what Selden writes in the same work, bk. 2, ch. 11, p. 262; namely, that if a proselyte of the household expressly cursed the four-lettered Name, he was to be punished with death by the Imperative Law of Nations; but if a Jew did the same thing, it was by his Civil Law that the same penalty was inflicted. For even if the same offense was differently punished in the case of a Jew and of a proselyte, still the punishment in each case came from a determination of the Civil Law. Why? I ask. Because they were all subjects of the same State, the proselytes living there in an inferior rank and legal position as compared with the Hebrews, and unable, it is needless to say, to claim the status of a free nation.

XXII. Nor could those Gentiles be reckoned a free nation who, from the moment of their entrance into the Hebrew State, were commorant there for the time being, even if they were domiciled in, and members of, some other State than the Hebrew Commonwealth. For foreigners of that type, who are temporarily commorant in a State, are no less to be reckoned subjects thereof than those who take up their permanent abode there, even if the position of the two classes of subjects differs in point of duration and in other matters, too. "A temporary subject is within the operation of the local laws" (Grotius, *De jure belli ac pacis,* bk. 2, ch. 11, n. 5; Struve, *Exercitatio de ducibus et comitibus imperii Germanici,* 2, th. 12). An example will make this clearer. The position of the Jews in the German Empire and the Free Cities thereof is well-known. They are men of a different race from the Germans and form by no means a free nation. Indeed, they used at one time to be called slaves of the imperial treasury and as such were alienated and transferred by degrees to the Imperial Cities, being sold to them by the Emperors in times of need. And although the Jews may live and trade in some of these Cities more freely than even the indigenous inhabitants, and are indeed a very serious detriment to them, yet they have not the frame of a free nation and are no part of the State, even though they may aid in the preservation and increase of the wealth of members of the Oligarchy—an instance of the ways of giving stability to an Oligarchy which was certainly unknown to Aristotle and the other ancients. If, then, the subjects of the Empire or burghers of the Cities are bidden by enactment to hold intercourse and dwell and carry on business in this or that way with the Jews, shall not what is thus ordained upon them be reckoned to be a Law of Nations, either Imperative or Intervenient, operating between the two? Not at all. It is Civil Law.

XXIII. Now in my view the Law of Nations, properly so called, is to be considered as made up of two parts, Common and Peculiar (*proprium*). If any one prefers to give other names to these same things, I have no objection. I call that Common which many, or maybe most, nations—at any rate the more cultured ones—use, and by which they are linked together. The Peculiar (*proprium*) is that which is developed for the peculiar use and common behoof of a few, maybe only two, free peoples; so that other nations can not be bound to observe it. Grotius himself recognized this division in a certain way; for after (*De jure belli ac pacis,* bk. 3, ch. 4, n. 16) declaring it wrong to empoison arrows in war, and so double the causes of death, he adds that any breach of that rule will be an offense, not against a Universal Law of Nations, but against that of Europe and of any peoples who have adopted European civilization. And in the last number of ch. 4, he says: "And it is right that the following rule should be observed among Christians, not only as part of military discipline but also as part of the Law of Nations; namely, that he who has committed a violent assault

on modesty, even in war, is liable to punishment everywhere." But he had said a little before that this is a law, not of all nations, but of the better ones (same, last number). In bk. 3, ch. 6, n. 3, he concludes a discussion of the question, When are movables deemed captured by the Law of Nations? with the following words: "We see that by the more recent Law of Nations the rule has been introduced among Europeans that such things are to be reckoned captured when they have been in the enemy's power for twenty-four hours." Hereon Ziegler notes, "Grotius is wrong in giving the name Law of Nations to that which has been received among two, three, or four peoples by mutual agreement." We shall soon be able to form a judgment about this criticism. It would, then, be permissible, according to Grotius, to subdivide what we have called Common Law of Nations into the part which is of wide operation, what he more than once styles Universal, and the part of less wide operation, which obtains only among the more cultured peoples, or Christians.

XXIV. I include in the Peculiar (*proprium*) Law of Nations all treaties and public engagements of free nations which have been entered into because of their utility, although only where there are at least two contracting parties; for whatever is introduced by the free judgment whether of two or of more nations, and has the force of Law for them, and binds together and preserves the Society which they compose, is a part of the Law of Nations. Now who will be bold enough to deny that the authority of treaties and of public agreements, even between two nations, is indeed as high as this? Compare herewith what I laid down above in sections XI and XII. And this view is strengthened by what I said above about the office of Fecials; for these did not believe that only those things belonged to it which are comprised in the Common Law of Nations, such as weighing the causes of war, declaring war, discharging the duties of an embassy and such like; but they also considered that matters of the Peculiar Law of Nations were within their province, such as laying down the conditions of peace, striking treaties, interpreting treaties, and the like acts. And although I very willingly grant that the Common Law of Nations is preëminently the Law of Nations, or is reckoned so, especially if regard be paid to the usage of popular speech, yet truly and properly that is also the Law of Nations, and deserves to be so styled, which is developed between even two nations by means of a treaty. Some one, then, was wrong in making— and Mevius (*Prodromum,* insp. 5, n. 16, at end) was wrong in approving—the remark: "Care must be taken, not to confound matters of the Law of Nations and things ordained by the compacts of nations." We, too, would not wish the Common and the Peculiar parts of the Law of Nations to be confused; but all the same, each is the Law of Nations.

What Mevius had remarked earlier, in n. 16, is more correct: "The number of those who employ the Law makes no difference."

I said above that the Law of Nations is ordained by the consent of Nations or by compact, and this either tacit or express. It must now be added that the Common Law of Nations is introduced by tacit compacts, and the Peculiar almost always by express. We will now make a more thorough examination of the nature of each.

XXV. Let us, then, begin by looking at the nature of that Law of Nations which we have called Common and which has the best claim to be called by the former name, and at the way in which it has obtained the authority of Law. Grotius shows us the way (*De jure belli ac pacis*, bk. 1, ch. 1, n. 14) when he says that the Law of Nations is approved in the same way as Civil Law of the Unwritten kind, namely, by continuous use and the testimony of experts, and that for this purpose the greatest assistance is afforded by historians of repute. For just as all Law is in general Written or Unwritten—or, as the Greeks put it, τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγγραφοι (*Dig.* 1, 1, 6; *Inst.* 1, 2, 3)—so also, in the particular case of the Law of Nations properly so called, one kind is Written and the other Unwritten. Of the latter kind is the Common Law of Nations; of the former kind, almost entirely, what we have called the Peculiar. The nature of this Unwritten Law of Nations will, then, perhaps appear more clearly when we have enquired into the way in which Unwritten Law in general obtains obligatory authority.

XXVI. "The Law which Usage has approved comes to us without writing; for long-continued use, when approved by the consent of those who use it, resembles Statute Law," says Justinian (*Inst.* 1, 2, 9). And Julian well says (*Dig.* 1, 3, 32): "Ancient customs are quite deservedly observed like statutes. This is the Law which is called Customary. For statutes bind us for no other reason than that they have been accepted by the judgment of the people; and so those things which, without writing, the people has approved will deservedly bind every one. For what difference does it make whether the people declares its will by a vote or by things themselves and deeds? And that is also the reason why it is very properly received that statutes are abrogated not only by the vote of a legislator but also by desuetude which is based on the common consent of all." And Ulpian (*Dig.* 1, 3, 33): "Long-continued Usage ought to be observed like Law and Statute in those matters which do not come to us in writing." Hermogenianus (*Dig.* 1, 3, 35): "But those things also which have been approved by long Usage, and observed over a long period of time, are upheld, as being a tacit agreement of the citizens, not less than Written Law." "Verily," says Paulus (*Dig.* 1, 3, 36), "Customary Law is held of great authority, being so highly approved that it was unnecessary to embody it in writing." (Add also the whole of *Cod.* 8, 52; and Decretum, dist. 1, c. 5; and Decretals, 1, 4, 9.)

XXVII. From these texts mainly, the jurists derive the doctrine of Customary Law. But one thing in them displeases me, that while sticking in the letter and on the points of these statutes with excessive tenacity, they do not think and speak everywhere with sufficient correctness; for they deduce herefrom, among other things, that this Law is introduced solely by the People. Now legislative power is in the hands of him or them in whose hands is *τὸ κύριον*, the sovereignty, or *ἀρχὴ κυριωτάτη*, the sovereign power, in the State. And he who would bind all subjects of a State to himself by legislation, must needs be the superior of them all and have the State in his own hand. Even if, then, the authority to make Law was, during the free Republic, in the hands of the Roman people, yet, now that the character of the State has changed, this legislative authority is in the hands of him or them in whose hands the State is. Let it therefore be taken as undoubted that this Law, whether Written or Unwritten, can not attain the authority of Public Law except by grant of the Sovereign, in virtue of the supreme legislative power inherent in him.

XXVIII. Now although a repetition of acts is ordinarily requisite in Law based on Custom, and these acts are ordinarily done for the greater part by subjects, yet the subjects contribute nothing to the authority of that Law, but only furnish the material to the Lawmaker, so that he, if it seem good to him, may endow it with the form and force of Law. And for this it is necessary, first, that he should be aware what sort of things are being repeatedly done in his State; and next, that he should not dissent therefrom, but should allow them to be done; and lastly, that his permission to do and repeat this should be so given that he seems to have approved it by tacit consent, and also wishes, and as it were orders, others to do the same thing; for in the absence of this third requirement, it might be thought a case of mere permission or tolerance, and not Law. Hence Ulpian (*Dig.* 1, 3, 34) gives the opinion that, on occasions, an enquiry must be made whether or no the Custom has been established in the teeth of some adverse judgment of a court. That this is not unconditionally necessary, however, is proved at considerable length by Tiberius Decianus (*Responsa,* vol. 2, resp. 51, n. 61; onwards), Gail (*Observationes practicæ* 2, 31, n. 8), Hilliger (*Donellus enucleatus,* bk. 1, ch. 10, letter H), Bachov (on *Dig.* 1, 3, 32, and on Wesenbec, same *lex,* n. 9), Hahn (*Dissertatio de consuetudine,* th. 14).

XXIX. When, then, with the tacit consent and approval of civil Majesty, the authority of Law is attributed to Custom by reason of the repetition of the acts in question (which are not to be over-exactly counted, but left to the Lawgiver's discretion), that Custom then produces for similar acts those legal effects which are attributed to itself. And on this account Custom is said to be *pro jure* and *pro lege,* and there

is said of it that *imitetur legem;* that is, it gradually and tacitly obtains from the Legislator the same legal effects and authority as Laws which have been expressly enacted and promulged. Just as, then, we say that Public Law of the written or express kind is an express pact, so the Tacit Pacts, on which we have said that the Common Law of Nations is founded, resemble in this matter Custom which has obtained the authority of Law.

XXX. Now the nature of that Usage on which the Law of Nations reposes is not obvious, but the knowledge of it contributes much to the thorough understanding of the nature of that Law. To me, indeed, it appears highly probable, passing by what others may have thought, that the Common Law of Nations, which is preëminently so called, takes its rise first of all in the Peculiar Law of Nations which derives its bindingness from express pacts. For a few, or it may be two, nations agreed to ordain between themselves, by express pacts, some certain and lawful effects of war and decided, for the better discharge of the businesses of peace and war, that ambassadors should be sacrosanct and that various other businesses should have the bond of a mutual obligation thrown over them; and then, wars and other businesses of the kind referred to having gradually recurred over and again, the same rule was in course of time approved by others also in their practice, not, indeed, that individual nations, in their own interest alone, imitated in this matter the few nations mentioned, but that they all by degrees established among themselves the same Law, and with tacit agreement authority was added to it by Custom which was spread over a number of nations, whose common interests were thereby subserved, and over a sufficiently long period of time. Hence it is clear how sound was Grotius' remark (*De jure belli ac pacis,* bk. 1, ch. 1, n. 14), that the Law of Nations is approved in the same way as Unwritten Civil Law, namely, by continued Use and the testimony of experts; for it is *εὕρημα βίου καὶ χρόνου,* " a discovery of life and time." " Whatever the globe holds that was not created, has furnished the rest with an example of imitation. The better adapted it is to human uses, the more quickly and widely it has been diffused and extended " (Mevius, *Prodromum,* insp. 5, n. 11). And in n. 13: " If you will take individual cases, you will find that nothing which indubitably belongs to the Law of Nations was created such by the nations by one simultaneous act."

XXXI. I said that the larger number of nations took the Common Law of Nations from a few nations by *Imitation,* and that by a tacit pact this obtained the authority of Law and Obligation among them because of its continued and extended Use among them. " For Imitation is implanted in men from boyhood. And herein they differ from other animals, Man being an animal most adept in Imitation. Men receive the rudiments of their education through Imitation. And they are all

pleased with things which are expressed by Imitation. A proof of this is furnished by what happens in the case of the productions of craftsmen: for things which we do not like to look at in reality, we take pleasure in seeing exactly reproduced in art, such as the forms of the lowest beasts and of corpses. We are then prone by Nature to Imitatation." So says Aristotle (*Poetics,* ch. 4). To imitate is so to adapt oneself to another's pattern that one becomes like him. One requisite, then, in Imitation is Exertion or Practice, whereby one may fashion oneself on the other's pattern, and so attain his likeness (Voss, *De imitatione,* ch. 1). Now a double pattern can be put forward in our case, because on both sides the free nations who are being imitated have created a mutual obligation, the requisite authority being gradually added by the Imitator, since Usage on the part of many, or even between the parties themselves, is, by a tacit pact, received as Law. One case, which, I believe, holds the foremost place, is the development of the Common Law of Nations by the imitation, as I have said, of the Peculiar Law of Nations (preceding section). I will not, however, exclude cases of the imitation of other patterns, nor obstinately assert that the Common Law of Nations was introduced in one way only. For, just as my own conjecture seems to me very probable, so also it is a plausible view that it took its rise in the similar Civil Law of many nations. On this, see section III above. In order that this should furnish another case of development by imitation, this employment as a Civil Law among many nations involves its gradual reception as a common bond of Law between these same nations.

XXXII. Ferdinand Vasquez expresses the following opinion: " The whole of the Law of Nations was originally only Civil Law, but it gradually crept or quickly flew to the other peoples and places " (*Controversiæ illustres,* bk. 2, ch. 54, § 4). Vasquez, however, seems to be speaking of something called Law of Nations by analogy or improperly, which Bachov, when weighing Vasquez's opinion, calls the Secondary Law of Nations, with a new meaning which is very different from that which we proposed for it above. This is the Civil Law of many nations; and, as we are concerned with the Law of Nations properly so called, it is so far not germane to our purpose. It is not, however, unlikely, as I suggested a little bit above, that, as this same Civil Law was approved by many peoples individually because it was of the same Utility to each of them, it should also find acceptance among them jointly; if so, it would be after the manner, and with the force, of a Pact which sets up a mutual obligation, as Grotius is right in requiring of the Law of Nations, of the Common kind and properly so called (*De jure belli ac pacis,* bk. 2, ch. 3, § 5).

XXXIII. The illustrious Johann Heinrich Bœcler, when commenting on Grotius' bk. 2, ch. 1, § 14, p. 169, holds the following discourse about the origin of the Law of Nations:

"The question is, Whether it was by means of a Pact that the many nations in question introduced this Law and mutually made it a Common Law for themselves, or whether it passed by means of Imitation from one nation to another and at last came to prevail among a great number. According to the latter method, what is there to prevent the Law in question from being and remaining the Civil Law of many nations? As to the former method, which alone is competent to develop a Law of Nations, that is, a Law made by the nations, the difficulty of proving it will be reached in the suitable place. Certainly we can not expect any Express Pact to appear, and so shelter is found in a Tacit Pact."

Any one can easily see that this writer is discoursing about the Common Law of Nations; for I do not think any one will dispute that what we have called the Peculiar Law of Nations is instituted by express pacts. Accordingly, in enquiring into the origin of that Common Law of Nations, the two methods mentioned by Bœcler are not to be separated, but to be conjoined. For, Imitation is seen at work in the Use both of the Peculiar Law of Nations and of the Civil Law of many nations, each of them being available as a pattern for such Imitation. A Tacit Pact is perceived and presumed in that same Use which gradually obtains among many diverse nations under the influence of increasingly various kinds of Utility.

XXXIV. The English jurist, Richard Zouche, discourses as follows on this matter (*Elementa jurisprudentiæ,* part 1, § 4): "The Law of Nations is a rule of right conduct which is approved by the judgment of many nations and men. Its sources are Ratiocination and Custom: the former has thought out by the employment of reason the things which are of utility to the human race; and the latter has established by common experience what is suitable to the human race." In this passage nothing is distinctly or accurately demonstrated; but rather everything is confused and involved, as may be seen from the texts of Roman Law which the writer adduces, namely, *Dig.* 1, 1, 1, 4, and *Inst.* 1, 2, 2 (at *jus autem gentium*), in which the Laws of Nature and of Nations are tossed into one mash-tub. If, then, by Use and Custom something useful and suitable to many nations is discovered, and to attain this end a universal rule of conduct is put forth as if it were a rule of Law or a statute, this can not be achieved without Ratiocination, but Legislative Prudence must needs lend its aid here. Now Prudence is an attitude of mind which is conjoined μετὰ λόγου ἀληθοῦς, with true Reason or Ratiocination, whereby a man can rightly deliberate and decide on those things which are expedient for living a good and happy life (*Nic. Eth.* vi, 4, § 10,

and 5). And Experience helps Prudence, providing it with many details which it has discovered. "For Experience, which is occupied with the practice of things in detail, renders the mind fit to distinguish and define principles, that is, propositions which we ordinarily develop from a number of isolated acts; and we thence forecast what will happen, and when; for Prudence frequently predicts the consequences of an act, having seen much of the same kind of thing, and so having learned what are the usual consequences of a thing even before it actually occurs." Thus Eustratius, on *Nic. Eth.* vi, 10, § 23, where he acutely remarks that the Philosopher conjoins with the elders, who are strong in Experience, the Prudent, who reason systematically on the details which Experience has collected.

XXXV. I am afraid that Zouche has addressed himself to this task in order to pay homage to the texts of Roman Law and to give further support to the received division of the Law of Nations into Primitive and Secondary. For the commentators are so much under the sway of the old jurists as to say that knowledge of the Law of Nature is obtained by Reason, and the knowledge of the Law of Nations by Reasoning. And this was the opinion of Wesenbec, which we have touched on above, section V. And for this reason Mevius thought there was no absurdity in calling the Law of Nations a Law of Reasoning. Yet he rightly recognizes that we get our knowledge of the Law of Nature alike from first principles and from the conclusions of Reasoning. Indeed, a large number of the rules of Natural Law are learned by ratiocination. Although, then, Prudence has educed the doctrines of the Law of Nations by ratiocination, yet they are collected from other principles, those, namely, on which Arbitrary Law reposes, in order that, when they have been discovered by aid of the principle of Utility and approved by the nations, they may be of service to the various States of the world. Hence, among other things, Mevius has the following in his *Prodromum jurisprudentiæ gentium communis* (insp. 5, n. 9):

"Reasoning, in accordance with natural dictates, aims at a rectitude of life and character, which is in the highest degree conformable to unblemished nature. But as to the things which the Law of Nations produces, it gathers from the needs and practice of fallen human nature whatever is most fit and available to serve the safety and uses of men. Much as the two kinds of Law differ, then, in end and in aim, Reasoning affords what is required for establishing each of them and for learning about it. Now this deserves to be noted in order to avoid the confusion of the two, and the error also of those who confuse Natural Law and the operation of Ratiocination."

So far Mevius.

XXXVI. It is also worth while to hear Albericus Gentilis on this matter. After he has given the usual description of the Law of Nations as something common to all the human race, he proceeds as follows:

"This is not to be taken as meaning that all (*omnes*) nations ever made a kind of agreement and so established the Law in question. That is not the meaning. It is not necessary to take the word '*Omnes*' in the same sense as when spoken of the usage of all (*Omnium*), nor even that it should be understood of absolutely all nations, for they are still innumerable and very widely scattered in space, and utterly different in manners, and unintelligible to each other in their varieties of speech. Let not the great jurist Hugo Donellus deceive you when he gives that interpretation to the definitions and then repudiates them on that ground. But let what is seen to be agreeable to *all* successively, be reckoned the decree and counsel of the whole world. Indeed, Unwritten Law, such as this is and such as Usage is too, is not introduced in any other way" (*De jure belli,* bk. 1, ch. 1, p. 11).

More than one thing in this jurist is to be noted here. In the first place, he draws ill the distinction between the Law of Nature and the Law of Nations properly so called; nay, he rather confounds the two, as is unmistakable by any one who examines the whole passage. Then, there being no Law of all nations other than the Law of Nature, as I have shown above, Donellus was quite right in rejecting the stupid definitions alluded to. But Albericus is so far right in his views that, nations being unnumbered and far apart from one another, it is in succession that they have consented to the rules of their Law. And as to the manner in which they approved these rules with their consent and received them among themselves, he indicates that it was the same as I have shown; namely, by Usage on their part, repeated, propagated, grown old, and admitted among nations as a bond of their society, exactly as an Unwritten Law of Usage does gradually get built up by long-continued use. This mode of development is also explained and affirmed at some length by Mevius in his *Prodromum,* insp. 5, where a somewhat singular opinion is given as to the way in which this Law is said to be the Law of *all* nations: "Not because all nations either consent to it or have received it, but because it is serviceable to all in the direction of justice, peace, and safety or looks to the common interests of all" (n. 5). But as Mevius' remarks on the manner of establishing the Law of Nations are sound, this passage seems to have escaped revision.

XXXVII. I could wish that all of this my dissertation on the Law of Nations as a genus and on its Primary species, which I have called the Common Law of Nations, would be suitably and kindly received, and not captiously. But the better to avoid any hawking at my words I will give a fuller explanation of some of the above. Of certain matters belonging to the Law of Nations I have said that it is manifest, by a Presumption, that they have been received among free nations by their assent. Now their bindingness is induced by Usage and Custom grad-

ually, and is not openly promulged nor at one and the same moment, but acquires strength, and, so to say, makes growth, slowly and imperceptibly; and so the beginning of the certainty which can in the earliest stage be had about the rise of that obligation seems to rest on a Presumption. But when nations give surer evidence of their assent, and maybe testify to it in their conduct, we become quite sure that an obligation has been fully set up among them. If, however, anew you babble on, saying that it is by means of Presumption that we obtain from facts of this kind a settled opinion about the consent and agreement of nations, I will not contest the point, seeing that everybody is aware that Presumptions are not of one kind only, but that different Presumptions give us differing degrees of certainty, some less, some more, some the highest possible. From this it follows, moreover, that the Tacit Pacts on which the Common Law of Nations reposes can not be of one kind only; for " ' Tacit ' has different meanings. First, when it comes as an inevitable consequence of what is Express: this is reckoned the same as Express. Next, ' Tacit ' means what flows from the nature of the act: this also is reckoned the same as Express. Thirdly, ' Tacit ' means what is induced from Presumptions. Lastly, ' Tacit ' may also mean what is proved by the Fact " (Franciscus Mantica, *De tacitis et ambiguis conventionibus*, bk. 2, tit. 5, nn. 30, 31). Now this last kind of " Tacit " is put into a separate class only in a comparative sense, and by reference to the ordinary way of calling that Tacit which is not expressed in words. But if you consider this kind of "Tacit" in an absolute sense, it must rather be held to be of the Express type—for what is the difference whether nations testify their assent by vote or by conduct (argument in *Dig.* 1, 3, 32). Nor do I see what there is to prevent us from interpreting the saying of the jurist (*Dig.* 2, 14, 2), " Contracts are also formed *re*," that is, by act, to apply alike to Consent shown by conduct and to Consent expressly signified by words; although Borcholten (*Commentary on Title De pactis*, ch. 2, n. 2) limits the meaning of the jurist to the particular matter mentioned. But if any one, with Socinus junior, Cravetta, Salicetus and Curtius junior, would range Consent testified by conduct midway between Intent Express and Intent Tacit, it will not prejudice the present argument. For Consent is reckoned Tacit by comparison with that Consent which is signified in express words, though it may be deemed Express so far as its effects are concerned. Nay, a Pact may at times be said to be in part Tacit, in part Express (Mantica, place cited, nn. 31, 34). And although, as a rule, there is more legal result in an Express than in a Tacit Pact, yet sometimes it is the other way about, as when Law or juristic Science presumes the existence of a contract because of long continuance and other reasons (Mantica, place cited, nn. 26, 29).

XXXVIII. Now that I have shown that the whole of the Law of Nations has been developed and established for reasons of Utility, this

will perhaps remain unchallenged, and I shall have succeeded in convincing every one that all Arbitrary Law has this end and that the Law of Nations is one branch thereof. Under Utility I include Necessity, for the more necessary anything is to us, the more need we have of it as a Useful thing. ἡ ἀνάγκη διδάσκαλος τῶν συμφερόντων, "Necessity is the teacher of Utility" (Dionysius of Halicarnassus, bk. 5). If any one calls on me in addition to set forth those Utilities and Necessities one by one, I will do so in certain prominent and obvious matters; for no one could set them all out fully, and it ought not to be asked of any one. As Cicero says (*De inventione,* bk. 2), There are things which have passed into our daily practice which, from the standpoint of Utility, are somewhat obscure. (See also *Dig.* 1, 3, 20.) Let us, then, proceed to certain particular topics in which that Common Law of Nations has obtained the force and effect of legal enactment; for we will deal with that branch first, and then with the Peculiar Law of Nations and its appurtenances; and thereafter we will go into the question whether there is any Law of Nations at all. This last-named discussion is one which can not be successfully attacked or carried through without first settling the matters first named.

XXXIX. There is no bottom to the wickedness of mankind (*Politics* ii, 5, p. 91 in my copy); and the bulk of the wrongs that men do voluntarily, spring from Ambition and Avarice, almost wholly (*Politics* ii, 7, p. 113); and men do these wrongs not only to satisfy their actual needs, but also because of the pleasure they find therein and in order to avoid the torture of their desires and lusts (*Politics* ii, 5, p. 89). And so nearly all the wars of former times, and of to-day, too, are such as, judged in the forum of conscience (what Grotius in several places calls Internal Justice) and by the rules of Natural Law, must be pronounced mainly Unjust, and, in the pious and correct judgment of Grotius, they, when examined by the standard of the Internal Law, are not far removed from Robbery (*De jure belli ac pacis,* bk. iii, ch. 16, n. 1). Yet some wars are Just, as they can be according to our theory. Now as Law is twofold, namely, Natural and Arbitrary, so each of these varieties exercises its authority over War. But what I have said so far hereon refers to the Law of Nations, and not to Law as a whole.

XL. As regards the Law of Nature, the first thing required is the Justice of the Cause, namely, that some hurt has been done wrongfully to one of your interests. Next, the hurt must be sufficiently serious. For the Prætor would not grant his extra-ordinary remedy of *restitutio in integrum* (that is, the undoing of some legal transaction) where only moderate damage was sustained (*Dig.* 4, 1, 3; and 4, 3, 9); and much less will Nature allow the abnormal and extra-natural remedy of War, for any slight hurt.

XLI. The underlying Cause of a War must not only be Just; it must also be Necessary. For if satisfaction or reparation of the wrong

be offered, or can be obtained by any other peaceful means, this terrible alternative remedy must not be resorted to. We have seen, above, what religious care the Fecials devoted to this matter, and it is deeply to be regretted that Christians have departed so far from that sacred observance of the Pagans. "Human or rational nature is driven to War only κατὰ δεύτερον πλοῦν, as the Greek proverb puts it, that is, in the second resort and as a subsidiary measure, because Peace and Society and Law, which is the bond of Society, can not otherwise be preserved or obtained, and where War is the one and only remaining means of saving Society and its Law." (Bœcler on Grotius' bk. 1, ch. 1, p. 178.)

XLII. The Law of Nature further requires that War be considered in reference to its due end and aim, which is Peace; and if Peace be not threatened by wrongful act or design, it ought to be seized on with both hands and always preferred to War. "We wage war in order that we may enjoy peace; for no one desires war or prepares to go to war simply for its own sake. A man would be absolutely bloodthirsty who, simply for the sake of fighting and slaughter, were to make enemies of his friends"—that is, such friends as he has on honorable terms (Aristotle, *Nic. Eth.* x, 7, § 21, onwards). How much greater watchfulness, then, ought Christian Princes to bestow in embarking on War, nay, in avoiding it rather and, even when it is just and necessary, in breaking it off as soon as possible; for it behooves them, all and singular, in undertaking and carrying on so atrocious a business, to be most Christian, that is, most observant of the precepts of Christ, and above all, of Charity.

XLIII. Next, the Law of Nature demands that War be conducted in a lawful manner (*juste*); that is, that for attaining the due end of War, the belligerents choose the due means, and measures which are at least permitted by this Law. To make it clearer what manner of making War not only is approved by the Law of Nature as Just, but also may be reckoned to be established as such, nations have agreed by a tacit pact and by usage to adopt certain arbitrary rules of War, relating to the manner of lawfully undertaking and carrying on and putting an end to a War. This is how the remark of Hermogenianus, that War was introduced by the Law of Nations, is to be understood. (Add Grotius, *De jure belli ac pacis* i, 2, n. 4.) Meanwhile I remark forthwith that there are some effects of War which are lawful according to the Law of Nations, but which, when tested by the Law of Nature, are in part found gravely wanting and are condemned by it as unjust. And whenever a belligerent foresees or notices this, he will duteously bring that External Law of Nations back into harmony with the rules of the Internal Law and rectify the defects of the former.

XLIV. In order, then, that a War may be lawful from the standpoint of the Law of Nations, in regard of the manner of its commence-

ment, it must be undertaken on the authority and under the auspices of him who has *τὸ κύριον*, Sovereignty, in the State; for a large part of the sovereign prerogative deals with War. Such a War, says Grotius (*De jure belli ac pacis,* bk. 1, ch. 3, n. 4), is ordinarily called Just, by reference, that is, to the Law (*jus*) of Nations, because individual legal effects flow therefrom. The word Just (*justum*) is here used in the same way as a *Testamentum* is called *justum* in contrast with *Codicilli* and as *Justæ Nuptiæ* are so called in contrast with the unions of slaves or with concubinage, the idea involved being that such a *Testamentum* and such *Nuptiæ* produce definite and peculiar results under the Roman Civil Law. In this way a Just War is rightly styled by Grotius "Public," the meaning of which word can best be obtained from the definition of *Hostes,* Enemy, which the jurists have left us. *Hostes* are those on whom the Roman People has publicly declared a War, or they themselves on the Roman People. All others are called Robbers and Bandits (*Dig.* 49, 15: 24 and 19 (2) and 21 (1); and 50, 16, 118). In other States, if a War be initiated by him who holds that supreme power which at one time was lodged in the hands of the Roman *Populus,* this War will be Public and Just.

XLV. Even this is not enough to make a war perfectly Just according to the Law of Nations. It is so only when it is publicly ordained by the Sovereign in such a way that it is signified to the other party solemnly or in the accepted fashion, as by solemn Promulgation, Declaration, Denunciation, or Heraldic Proclamation. Such a war, so undertaken and signified, is called by Grotius "Solemn" in accordance with the Law of Nations. I do not here refer to the solemnities associated with a declaration of war by usage or the peculiar institutions of any given people—like the use of the herald's staff, or sacred herbs, or vervain, or a blood-stained spear, and its discharge into the enemy's territory, and other things of that kind which I mentioned above—"but such solemnity as shows that the war is waged, not as a private exploit, but by the will of each people or its governors. From such solemnity flow definite results which are not found in a war against bandits or which a king makes on his own subjects" (Grotius, *De jure belli ac pacis,* bk. 3, ch. 3, n. 11).

XLVI. In a War of this kind, which complies with the requirements of the Law of Nations, the infliction of injury and damage by each side on the other is lawful, whether it be done to persons or to property, and even if it fall on one who has a just cause to rely on, or on one who has been injured beyond the limits which may be taken as naturally allowed. That is what the poet is driving at in his verse,

> Tum certare odiis, tum res rapuisse licebit.

(Then—that is, when war has been solemnly declared—strife and hatred and plunder will become permissible.)

Here it is to be remarked, first, that whether we use *licitum* (allowable) or *licere* (to allow), it comes to the same thing. For sometimes that is called *licitum* which is so consistent with what is right (*honestum*) that you are bound to do it; and sometimes that is *licitum* which is right, but yet there may be another more laudable course; thirdly, the word is employed of what is *ἀδιάφορον*, indifferent, so that it does not matter whether it be done or left undone; lastly, it is employed of something which can not be done without an infringement of right and duty, but, over and above this, which will go unpunished of men, nay, will at times be considered entitled to the protection of the Courts. Now in War there are occurrences of different kinds which are, or at any rate are called, *licita*, but some in one meaning of the word and some in another. Hence Marcellus' saying, as given by Livy, "Whatever I have done upon the enemy, the Law of War defends." And the saying of Lucan, "Rightfulness conferred on Wrong," squares with the last-named meaning of *licitum*.

XLVII. This right of license (*licentiæ jus*), as Grotius calls it (*De jure belli ac pacis*, bk. 3, ch. 4, n. 6), carries its baleful activities very far; for this external inter-national Law of War allows the killing of women and children, and the slaughter, at any time, of prisoners and of those who wish to surrender but have not been admitted to terms, and of those who have surrendered unconditionally. But the inter-national Law of the more cultured peoples forbids poisoning an enemy, and the use of poisoned missiles, and tampering with wells. "War must be carried on with weapons and not with poison," we read in Valerius Maximus, bk. 3, ch. 8. He who uses a poisoned missile against an enemy, said Silius, dishonors his weapon. But so far as concerns the Law of Nature, it scarcely matters at all, other things being equal, who it is that is killed or whether death is dealt by the sword or by poison.

XLVIII. Much more is it allowable under this Law of Nations to destroy and plunder enemy property. History is full of the overthrow of walls, of the levelling of towns and castles with the ground, of the sowing of the land with salt and the driving round it a hostile plough, of the burning of dwelling-houses, aye, and of crops, too. And passages in the *Digest* (11, 7, 36; and 47, 12, 4) confirm that neither sacred places nor religious places were exempt by the mere Law of Nations, provided the enemy did not offer violence and outrage to the bodies of the dead. And the plunder, injury, or destruction of enemy property may be effected not only by violence but by fraud—provided this fall short of perfidy, for otherwise fraud will not be reckoned right even by this Law of Nations (Grotius, *De jure belli ac pacis*, bk. 3, ch. 1).

XLIX. Further, in a war which is solemn in accordance with the Law of Nations, enemy property which is seized or occupied passes by the same law into the ownership of the occupant; so that it is relinquished

by nations, not only to him himself, but also to those who, through him, derive title to the possession of it; nay, according as circumstances require, this title must be asserted with the help of the Courts. ὁ γὲ νόμος, ὁμολογία τίς ἐστιν, ἐν ᾧ τὰ πόλεμον κρατούμενα τῶν κρατούντων εἶναί φασι, "For the law is a kind of agreement by which it is declared that the spoils of war belong to the victor." So says Aristotle (*Politics* i, 4, pr.). Things captured from the enemy become at once the property of the captors (*Dig.* 41, 1, 5, 7; and *Inst.* 2, 1, 17). And in this respect it is indifferent whether the property is captured from an enemy State or from enemy subjects. It is, further, certain that by the Law of Nations, if the things captured from the enemy in war had been previously seized by him from others by the same right, these latter can not claim the things in question from the victors (Grotius, *De jure belli ac pacis,* bk. 3, ch. 6).

L. Those who surrender in such a war, or accept terms of slavery, or are captured, become the slaves of the victors by the Law of Nations. And they are deemed to have been captured, according to Pomponius (*Dig.* 49, 15, 5, 1), when the enemy has brought them within his lines. And, according to *Dig.* 49, 15, 12, pr., they who have come over to the enemy in time of peace, become, should war suddenly blaze out, the slaves of their conquerors, among whom they, being now enemies, are captured by their own act (or, reading with Grotius *fato* instead of *facto,* by their own fate). " By the Law of Nations, those are our slaves who are captured from the enemy or who are born from our female slaves," says Marcian (*Dig.* 1, 5, 5, 1). And when an enemy is captured, his property also passes to his owner, and by the Law of Nations almost any treatment of slaves is allowed with impunity, except such as exceeds the limit which Civil Law may have imposed on cruelty. Gaius confirms this, saying, " Slaves are in the power of their masters, and this power originates in the Law of Nations. For we can see, among all nations alike, that masters have had the power of life and death over their slaves, and whatever is acquired by a slave is acquired for his master " (*Dig.* 1, 6, 1, 1; and *Inst.* 1, 6, 1). Grotius, however, observes that this rule of the Law of Nations about prisoners has not always been received, nor among all nations (*De jure belli ac pacis,* bk. 3, ch. 7, n. 8). Certainly among Christian peoples it has long since fallen into desuetude, and we have the evidence of Chalcocondylas (bk. 3), of Leunclavius (bks. 3 and 17), and of Busbequius (*Epist.* 3) that the Mahomedans adopt the same humane attitude. So restricted is now the application of this instance of a rule of the Common Law of Nations. Compare section XXIII above.

LI. Just as individuals, when captured in war, must submit to personal slavery, so, when the war is ended by the victory of one side, either the whole or part of the conquered State may pass under the sway and empire of the victor. Ariovistus told Cæsar that it was the law of

war that victors imposed what terms they pleased, and that the Roman People were wont to dictate to those whom they conquered, not at the bidding of any other party but at their own discretion (Cæsar, *Gallic War,* bk. 1). And just as the property of an individual who is captured is transferred with him to his captor, so the property of a State passes with the State itself into the power of its conqueror. "A man is held to have nothing in his power if he is not himself in it," says Ulpian (*Dig.* 48, 5, 21; and 50, 17, 118; and 41, 1, 54, 4. Grotius, *De jure belli ac pacis,* bk. 3, ch. 8).

LII. It is agreeable to the Law of Nature that criminals should be punished for their misdeeds; and the punishment or surrender of a criminal is a rule of Arbitrary Law. And this, being accepted among nations, is also a part of the Law of Nations. For if, after the commission of a crime, the criminal escape into another State, the State within which the crime was committed has no right to follow him with armed hand outside its own jurisdiction; and so the State in which the criminal is sheltering ought either to punish him itself, if applied to by the other State, or surrender him to the applicant to be dealt with at its discretion. "But this right to demand the extradition of those who have fled abroad is, in recent centuries and in the greater part of Europe, resorted to for those crimes only which seriously affect the State or which are especially heinous. The tendency is for lesser crimes to be passed over with a mutual condonation, unless the terms of a treaty require otherwise" (Grotius, *De jure belli ac pacis,* bk. 2, 21, n. 5). Cato certainly wanted Cæsar to be surrendered to the Germans for making war on them unjustly.

LIII. To use force against an enemy during time of Truce is contrary to the Law of Nations, as Lucius Æmilius, in Livy, tells the soldiers in his address. For a Truce is an agreement whereby, without an end being put to the war, there must be a cessation of hostilities up to a given time. And, although there is no need, on the lapse of the period named, for a fresh declaration of war, yet the Roman Fecials observed a different practice, according to Livy (bk. 4), in order to show their abhorrence of war and hostilities and their opinion that these should not be resorted to, save on just and necessary grounds. If the Truce has been asked for and granted for some specially named purpose, other things not included in the special convention are unlawful during the Truce; thus, if the besieged have obtained a Truce for the purpose of burying the dead, and meanwhile they seek to obtain, say, reinforcements or supplies, it is no breach of the agreement creating the Truce to prevent them by arms from carrying out this design (Grotius, *De jure belli ac pacis,* bk. 3, ch. 21).

LIV. The right of Postliminy has also been introduced by the Law of Nations, although under the Roman Civil Law different results

have attached to it, as may be seen in *Dig.* 49, 15. Now Postliminy is a right which arises on a return across the threshold (*limen*), which in this case is the boundaries of the States (Grotius, *De jure belli ac pacis,* bk. 3, ch. 9, n. 2). It occurs not only when one of our men who has been captured returns within our lines, but also when he, or property that is of a kind which admits of Postliminy, has reached our friends or an allied or friendly king, who are on the same side as ourselves in the war. For among those of our friends who are not on the same side, prisoners of war do not change their status, except in virtue of a special pact (*Dig.* 49, 15: 5 (1) and 19 (3). Grotius, place cited).

LV. In olden times a very frequent way of strengthening good faith and security among nations was the giving of Hostages; and not only males but women also were so given. Thus the noble Clœlia was given as a Hostage, with other virgins, to King Porsenna of Clusium by the Romans. And not only were adults so given, who might themselves have given their assent to be so bound, but young people also, alike infants and pupils * (Grotius, *De jure belli ac pacis,* bk. 3, ch. 4, n. 14). Whether, then, Hostages bound themselves by their own agreement or were handed over by others, if there was any breach of the good faith or security for the affirming of which they were being employed, they could, by this Law of Nations, be punished and put to death. This explains the complaint which Divitiacus addressed to Cæsar (*Gallic War,* bk. 1), namely, that Ariovistus was demanding as Hostages the children of all of the highest rank and was decreeing against them every variety of torture if anything should be done contrary to his wish and intent. He adds shortly after, that if Ariovistus were to learn of his complaint to Cæsar, he would undoubtedly inflict the severest punishment on all the Hostages who were within his power. The Thebans on one occasion slew two hundred and fifty Hostages; and the Romans slew nearly as many as three hundred of the Volscian Aurunci (Dionysius of Halicarnassus, bk. 16). It seems to have been peculiar to the Roman Civil Law that Hostages with the Romans were unable to make wills (*Dig.* 28, 1, 11), and that their property was confiscable to the Treasury (*Dig.* 49, 14, 31). As regards the latter, the explanation of Commodus' rescript to that effect is that be kept his Hostages and his prisoners of war in the same place, although the former were not really prisoners (Albericus Gentilis, *De jure belli,* bk. 2, ch. 19). And the reason why Hostages were not allowed to make wills is given by Albericus in the same place. Also if Hostages attempt to escape, they may be put to death by the Law of Nations, because they thereby are themselves attempting to make a very grave breach in the security which they were given up in order to strengthen. Thus the Tarentines who tried to escape were brought back to Rome, flogged and thrown from the

* That is, wards under 7 and over 7, respectively.

rock (Livy, bk. 25). And this explains the accusation brought by King Edward III of England against the Frenchman, of having received a fugitive Hostage in violation of the Law of Treaties (Polydore Virgil, *Historia Anglicana,* bk. 19). And if the delivery of Hostages was made on the terms that, if even one of them escaped, the obligation of good faith should be discharged as regards all, and one did escape, the rest could be put to death consistently with the Law of Nations; in Thucydides, bk. 4, we are told that this was done by the Athenians. (Add Albericus Gentilis, place cited; Grotius, *De jure belli ac pacis,* bk. 3, ch. 20; Joannes Schilter, *Dissertatio juridica de jure et statu obsidum.*)

LVI. So far I have set out some topics in which the consent of nations establishes certain legal effects; and these legal effects, when weighed in the balance of Natural Law, are found to be partly right, partly harsh, partly downright unjust and inhuman. Hence comes the justification for a fresh division of the Law of Nations, into the True (*Verum*) and the Putative (*Putativum*). I give the name *Verum* to that part which is not at variance with the Law of Nature, and the name *Putativum* to that part which is opposed and contradictory thereto. In this last class are those things which are allowed to pass as just but are pronounced unjust by the Law of Nature; and although in the human forum such allowance and acceptance give license and impunity in these matters, and may be passed off as Just, yet in the forum of Conscience they are condemned by the Law of Nature and, when they are scrutinized from within, the things which they declare Just are often found to be very Unjust. Grotius, accordingly, not only calls such Law of Nations External, but also in several places calls the right which campaigners acquire by the Law of Nations in property captured in an unjust war, External Ownership (*Dominium Externum*). Of course the Law of Nature, as being an emanation of Divine Providence, is always right; but Arbitrary Law is not seldom found wanting. On this matter I have discoursed at length in my disputation *De jure arbitrario,* th. 6, onwards; but the difference is more conspicuous in that part of the Law of Nations which deals with War, and this in proportion as War is a very harsh business and tends to brutalize the soul. Aristotle, accordingly, blames the Spartans for adapting their laws almost entirely to military efficiency, and for so hardening their citizens with warlike toil that they became θηριώδεις, wild. (*Politics* vii, 14, p. 486; and viii, 4, pr.) Now if any one calls on me for a detailed list of these matters which go counter to the Law of Nature, I will substitute Grotius for myself and he will give satisfaction on my behalf; for he not only mitigates and tempers these inhuman and unjust rules of the Law of Nations, but also often destroys their effect altogether and rescinds them. This may be seen in chapters 11 to 16 of his *De jure belli ac pacis,* bk. 3. He prefaces his approach to this topic with the following weighty utterance (*De jure belli ac pacis,* bk. 3, ch. 10, n. 1):

"I must now tread back my steps, and take from belligerents nearly all which I have seemed to grant them—and yet have not really granted; for when I began to explain this part of the Law of Nations, I testified that many things were said to be *law,* or *lawful,* because they are done with impunity; partly, also, because coäctive judgments of tribunals accommodate their authority to them, while the things themselves either deviate from the rule of right (whether that rule be regulated by strict justice, or by the precepts of other virtues) or, at least, may more righteously and laudably be omitted."

LVII. Now as regards the True (*Verum*) part of the Law of Nations, which is genuinely binding, its decrees are in part Harsh and Rigid, yet so as not to be unconditionally condemned by the Law of Nature. The last-quoted remark of Grotius seems applicable to them, namely, that they "may more righteously and laudably be omitted." Now Equity is ἐπανόρθωμα τοῦ νομίκου δικαίου, a corrective of Law, and very careful account must be taken of Equity in these matters of the Law of Nations, whether it be that their rigor is to be relaxed and mitigated or that a too general proposition is to be restricted. In the chapters just named Grotius gives numerous instances of the former kind of moderating influence, while the restrictive function of Equity will be found at work in certain conventions of the Law of Nations, and especially in connection with the interpretation of Treaties. "For there are numerous doubtful questions of interpretation, and there is always some perplexing topic before us," says Lucius Cornelius Lentulus, in Appian, towards the end of bk. 14 of his *Second Punic War.* (Grotius, *De jure belli ac pacis,* bk. 2, ch. 16, n. 22, onwards.)

LVIII. That is a very humane rule of the Law of Nations which provides security for Ambassadors. In accordance with it Ambassadors are called by writers in many places *Sancti, Sacrosancti, Inviolabiles.* Indeed, they are reckoned so sacred that he who injures them is said to break not only human but also Divine Law. Cicero says of the replies of the Augurs, in his *De haruspicum responsis:* "My view is that the rights of Ambassadors are fortified with the protection of men and also entrenched around by the Divine Law." And in his third oration against Verres: "The rights of Ambassadors are entrenched around by Divine and human protection, and they should be esteemed so sacred and venerable as to go unharmed, not only as between allies, but also when confronted with the weapons of the enemy." For among the Romans the Rights of Legation, on which, as we have seen above, the Fecials pronounced, constituted without doubt part of the Sacred Law (Cujas, bk. 11, obs. 5). But both Philip, in his *Letter to the Athenians,* and Plutarch, in his *Life of Æmilius,* and Josephus, *Jewish Antiquities,* bk. 15, when they call it an impiety to injure Ambassadors, seem to have yet another reason therefor, namely, that a pledge in the form of a safe-

conduct may have been given in a specially sacred and solemn manner and it should be kept with proportionately greater scrupulousness in reverence for the Deity Who is the especial source of the binding character of the obligation. Pomponius, commenting on Quintus Mucius (*Dig.* 50, 7, 18), well says:

"Any assault on an Ambassador of the enemy is deemed an offense against the Law of Nations, for Ambassadors are held sacred. And so Ambassadors who are with us at the time when war is declared by us on their nation, retain their freedom; this accords with the Law of Nations. Quintus Mucius, accordingly, used to say that one who assaulted an Ambassador must be surrendered to the enemy from whom the embassage came."

Ulpian holds that a man who is proved to have assaulted or outraged Ambassadors or Legates charged with an oral message, or their attendants, is liable under the *Lex Julia* concerning Public Violence (*Dig.* 48, 6, 7).

LIX. Now although the designation Ambassadors (*Legati*)—other designations being *Oratores, Nuntii, Interpretes,* Spokesmen, Envoys, Interpreters—is a general one and often much extended in common speech, yet, as regards the Law of Nations, those persons are not equally sharers in that Law who, though commonly styled *Legati,* are not such in the strictest sense of the word; but they only, or chiefly, share therein who are sent to one another by those, on both sides, in whom τὸ κύριον, the Sovereignty, of the State reposes. Grotius says hereon: "This Law of Nations, such as it is, attaches to those Ambassadors who are sent by Sovereigns to each other; for outside this class, provincial and municipal and other Legates are not governed by the Law of Nations, which operates between different nations, but by Civil Law" (*De jure belli ac pacis,* bk. 2, ch. 18, n. 2). Everywhere, then, they who are more nicely skilled in these matters call those who are sent by a Prince of less authority and lower rank to a greater Prince, Agents or Residents; and the envoys of the great City-States, Commissaries, Deputies and Syndics (Perez, nn. 1, 17 on *Cod.* 10, 65). But in designations of this kind usage not infrequently works changes, and these distinctions between *Legati* are now almost invariably better expressed in French or Italian. (See Carolus Paschal, Fridericus à Marselaer, and other writers on *Legati.*) Moreover, the decisive test is the usage of each nation and State; for Perez (place cited, n. 17) shows that the Legates of the great City-States share in most of the rights and privileges enjoyed by the Ambassadors of Princes.

LX. Ambassadors, then, preëminently so called, are sent by and to those in whom the supreme power, or the Civil Majesty, of the State reposes, and the prerogative of sending them is part thereof; and by the usage of to-day there are two kinds of them, Ordinary and Extra-

ordinary. The former are in attendance at the Court and Councils of those to whom they are sent, until recalled by him who sent them. The dignity of those of the Extraordinary class is higher: they are charged with some temporary mission in connection with either some Duty or Business or Honor, according to the classification of these ends given by Perez (place cited, n. 2). The cases of Business and Honor are various. Perez says that an embassage is in connection with a Duty when he who despatched it is bound to do something or make something good, as in case of the embassage from the King of Spain to a newly appointed Pope, in virtue of his Kingdoms of Sicily and Naples. (Guicciardini, bk. 7.)

LXI. Those envoys who were sent to the enemy used to be called *Feciales* and *Caduceatores*, but now Heralds. Much has been said above about the Fecials. Legates suing for peace were called *Caduceatores* from *Caduceus*, in Greek *κηρύκειον*, the wand which they carried in their hands. (Festus, bk. 3; Suidas on the word *κηρύκειον*; Pollux, *Onomasticon*, bk. 8; Gellius, bk. 10, ch. 27.) The wand of Mercury, by which that god was manifested as the mediator and go-between in matters of peace and war between disputants, was a *Caduceus;* and *Oratores,* charged to treat about peace, used to carry, in its likeness, a wand in their hands which rendered them sacred, immune, inviolable even at the hands of the enemy. (Pliny, bk. 20, ch. 3; Franc. Patricius, *De regno et regis institutione*, bk. 1, tit. 6.) Besides the *Caduceus* they used to carry herbs and vervain, the badges of the security which was their due. On this there is *Dig.* 1, 8, 8, 1, whereon Guilielmus Budæus (*Annotationes in Pandectas*,* folios 44, 45) has the following note: "The *Caduceatores* of our country wear a bracelet at the present time, or it might be called an armlet; in the vernacular its name is Blason. But during fighting they wear a cloak, and this covering makes them sacrosanct, that is, safe from all harm; it is commonly called a coat-of-arms." This is confirmed by Petrus Gregory of Toulouse (*Syntagma juris universi*, bk. 19, ch. 2; and bk. 33, ch. 14). And so we read in Sleidanus, bk. 15, that King Francis of France sent a Fecial to the Emperor Charles V, clad in the customary solemn garb. Add Hermann Kirchner, *De jure officii et dignitatis legatorum*, bk. 1, ch. 7, n. 64; this writer explains here that *Heralds* or *Herolds* are persons who are agreeable to and accepted by an army,† a bit of etymology which Æneas Sylvius rejects, claiming (but ineptly) that the word is derived from *Hero*. Voss deserves to be read on this word (*De vitiis sermonis*, bk. 2, ch. 9, p. 229). The Heralds of whom Wiguleius Hund speaks in his *Genealogia Bavarica* are clearly distinct from the Heralds of whom I have been speaking.

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* Paris edition, 1535, at p. 96.—TRANSLATOR.
† Old High German, *Hari*, an army; A. S., *here;* Mod. Germ., *Heer*.

LXII. The accepted Law of Nations concerning embassages falls under two chief heads; namely, that they must be admitted, and that, when admitted, they be not violated. But each of these rules has certain exceptions. For the Law of Nations does not enjoin that all embassages be admitted without discrimination, but only that none be refused admission wantonly and without sufficiently grave cause. There is more than one just cause for such refusal: there may be something defective in the sender, or in the person sent, or in the cause of the sending; each of these alone may suffice to justify the rejection of an embassage, much more the combination of them all. Illustrative examples hereof can be found in Grotius, *De jure belli ac pacis*, bk. 2, ch. 18, n. 3.

LXIII. Embassages are generally sent either in order that a friendship may be initiated, or that one already initiated may be announced with certain ceremonial or preserved, or that an extinguished one may be renewed. I say "generally," because I do not wholly exclude other different causes. If, then, any one wittingly employs as Ambassador one who is thoroughly distasteful to him to whom he is sent, having perhaps been an enemy of him or of his State, that Ambassador may certainly be refused admittance, for it is inconsistent with the nature of friendship that it should be negotiated by a man who is thoroughly distasteful in himself. And if the sender of an embassage equips it under the guise of duty or friendship yet there is grave suspicion that he is not doing this seriously, but rather with a view to pry into the other party's strength and resources and plans, or to do him a hurt, or in order to ask for some dangerous delay; or if a war be in progress of so savage a kind that no hope remains of an honorable peace: then, other things being equal, the embassage may be refused admittance; for all these things are inconsistent with friendship, which is a thing to be cherished sincerely, and not stained with pretence. (Perez, place cited, n. 8.)

LXIV. Aye, sometimes free peoples and Princes observe as a rule of the Law of Nations, that a preliminary enquiry should be made whether the State to which an embassage is going will receive it; or that the embassage should halt on the confines of the jurisdiction of this State until it has ascertained whether it will admit it, or receive it in a manner befitting the sender's dignity. For, if this be neglected, the State to which the embassage is despatched often bids it halt at the frontier and wait there, in order that the case may be considered and, if admittance be decreed, that the embassage may be received in a befitting manner and official attendants be added to its train. Sometimes an embassage which has over-rashly entered the jurisdiction is ordered to go back, or at any rate quit the State into which it is making its way. Guicciardini (bk. 18) and Bellay (bk. 3) tell us that the Emperor Charles V ordered the Ambassadors of the King of France and Venice and Florence, who had been sent to declare war on him, to be removed to a place at a distance of thirty miles from his County.

LXV. An especially memorable case is that of Theodore, nicknamed ἄθεος, Atheist, who was sent as an Ambassador by Ptolemy and rejected by Lysimachus; for how can one enter into sincere discourse and into an agreement with him, or pledge one's word to him, or receive an effective pledge from him, who has abjured the Supreme Arbiter and Preserver of good faith and society? The rejection of Ambassadors of this sort is permitted not only by the Law of Nations but also by the Law of Nature; for a professing Atheist professes himself the contemner and subverter of all faith and society and order and law, both human and Divine, and is not to be tolerated among men; much more is he no fit and proper person to bind either himself or his own State to another State, and to give adequate assurance to the other party with whom he is dealing. But nowadays Atheism has made such headway among men that it has no wish to conceal itself, but continually waxes stronger; and we are within an ace of seeing brethren who are tainted therewith storm heaven itself, after the disastrous example of the Giants. And agreements, treaties, and alliances which were framed to be perpetual, barely last a year; and this vineyard, never out of the tiller's hands, is, through failure to keep faith, ploughed up once a year, or even oftener in the same year. So it is a vital need that this business and all our civil affairs be ordained and administered by such men and ministers as aspire to true and not to feigned Wisdom. Far indeed from this type are those who, in the preceding century, began, in the best word of Politics but in the worst sense thereof, to distinguish themselves. (Thuanus, *History,* bk. 44; Conring, *De civili prudentia,* ch. 2, pr.)

LXVI. Lastly as regards this branch, we must pass over what Perez, following Albericus Gentilis, said about permanent embassies (n. 2 on *Cod.* 10, 65; and Grotius, place cited, n. 3 at end); namely, " By the best right of all, the permanent embassies which are now in vogue may be rejected; old usage, to which they were unknown, tells us how unnecessary they are." But although such embassies are not necessary, still it follows from the fact that they have made their way into that Usage of Nations on which the authority of this Law of Nations reposes, that an Ambassador of a Prince can not be rejected on the ground that his embassy is meant to be a permanent one, at any rate by one who himself maintains at the Court, or in the Capital, of that Prince a permanent Ambassador who is allowed to live there safely and in a manner befitting his dignity. Where, however, the two parties have agreed to, or have resolved on, a different course, or some other graver factor and principle has come into operation, another pronouncement, to meet the altered circumstances, will have to be made. Certainly (if either my wishes or my advice availed in this matter) it would be better to abrogate this custom, such danger lies in its reception; for too many examples prove the truth of the French proverb, that a permanent Ambassador is a traitor who is not a criminal.

LXVII. I pass to another head: What immunities an Ambassador can claim by the Law of Nations. This is a matter on which there is a diversity of opinion; for some think that what an Ambassador can claim is immunity from illegal violence, but not immunity from constraint of a judicial kind. Those who deny this latter limitation, and who are in favor of wider immunities, draw a distinction between the offense of Treason (*læsæ majestatis*) and all other offenses, holding that an Ambassador is liable to punishment for the former but not for the latter. Perez (place cited, n. 10) holds that in cases of delict no plea to the jurisdiction can be urged, but that every one can be tried in the place where he has done the wrong and where he is found, in regard of the penalty to which he has made himself liable by his wrongdoing (*Dig.* 5, 1, 20); also that Ambassadors are not immune from accusation by reason of the dignity of their office, so as to be able to bar the proceedings (*Cod.* 3, 24, 1; and 12, 1, 12), lest a privilege granted to them turn to the hurt of the State to which they have been sent. But I think that Grotius, following others, is of a sounder opinion; namely, that if an Ambassador be only safe from unjust violence, there is nothing important or distinctive in the immunity. Now the functions of Ambassadors are not only useful but often of the highest necessity; and so nations seem to have wished them to have a greater and distinctive immunity. Grotius confirms this, making the wish partly express and partly presumptive. And albeit the authority of Natural Law is of the highest, and wrongs in violation of it ought not lightly to go unpunished, yet it is unnecessary, and unsuitable to the condition of an Ambassador under the Law of Nations, that he should be punished by that State where he has done the wrong; but he can be sent back to his own master with a specification of his offense and a demand that he should either punish or surrender him. For, as Grotius well says (chapter cited, n. 4), The immunity of Ambassadors outweighs any good which their punishment might do.

LXVIII. And there must be no hasty recourse to punishment, even in the case where an Ambassador has plotted against the State to which he has been sent. Hence Livy says of the Legates of Tarquinius who had incited the betrayal of Rome, "Although they were seen to have acted as if they had been enemies, still the Law of Nations prevailed." But just as other Arbitrary Laws often admit of exceptions, so this: as, for example, if no other escape can be had from some imminent danger which an Ambassador has incited, he can be detained and examined, and, according to the circumstances, even be put to death. Where this last-named thing has come to pass, Grotius, who discusses this matter with extreme circumspection, would have it be by way of natural defense, and not of punishment.

LXIX. An Ambassador's immunity is due from the State to which he is sent, if it has previously allowed his entrance; for it is then bound by a tacit agreement in accordance with the Law of Nations. But when a State which proposes to send an embassage has been warned not to do so, under the risk of the members being treated as enemies, then, if the warning be not hearkened to, the members of the embassage may, according to circumstances, be expelled or imprisoned—aye, and even put to death. Nor does any immunity attach to those who, without permission, pass through the territory of a State on their way to or from an enemy of that State, or when contriving hostilities. Thus, the Spaniards captured and put to death in Padua the Ambassadors despatched by the King of France to the Turks (Paruta, bk. 2); and in Crantz's *Saxonica* (bk. 12, ch. 33) there is an account of the capture by the Emperor Maximilian I of an embassage sent from the States of Flanders; and a compilation from ancient history can be seen in Grotius (place cited, n. 5). When, then, either a friendly or a hostile State has admitted Ambassadors, they are immune by the Law of Nations; "for many businesses arise in war which can be transacted only by Ambassadors, and peace can hardly be inaugurated in any other way," says Grotius (place cited, n. 6).

LXX. On these grounds I incline to think that a new rule has arisen among nations, which gives security to the Trumpeters who are sent by one side and the other, and who act as channels of communication between the belligerents. Indeed, as they seem to represent and perform the functions of the old *Caduceatores,* with whom (said Diodorus Siculus) there was peace even in time of war, I shall raise no objection to the claim, if any one makes it, that this was extended to Trumpeters by the older Law of Nations. After Joannes Sleidanus (*Commentaries,* bk. 17) had shown the form in which a written declaration of war, addressed to Charles V by the leaguers, was couched, he went on to say, "This letter was sent to the Emperor at his camp near Landeshut through the hands of a high-born young Trumpeter, in the accustomed fashion." And although the Emperor took it ill and would not receive the letter, yet he let the bearers go without hurt, albeit they came from rebels against his authority, who by the Law of Nations were not true "enemies."

LXXI. I asserted above, that not only Ambassadors, but members of their retinue also, were inviolable (*Dig.* 48, 6. 7). And this extends even to their utensils and furniture, as we know from the old formulæ of the Fecials. On this Grotius says (place cited, n. 8): "These are protected in an accessory manner only and so far as the Ambassador chooses." For the Law of Nations expressly and primarily regards the Ambassadors themselves. But they can not dispense with servants and attendants, if they are to keep up a state correspondent to

the dignity of both the sender and the receiver of the embassage; and so security can be claimed for their retinue also, to the extent to which they are, and are actually employed as, parts and instruments of the embassage. So that, according as their rank and degree vary, so will it be easier or harder for a violation of their immunity to occur. If, however, any of the retinue commit serious offenses, their surrender can be demanded from the Ambassador; and if he refuses it or such satisfaction as is due, then he must himself be dealt with in the manner already indicated.

LXXII. Our reading tells us that, if the Law of Nations with regard to Ambassadors be violated, the wrong is most often redressed by war. Sacred and profane history alike are liberal in supplying examples of this; Grotius gives some of them, place cited, last number, and in his *Annotations* thereto he furnishes more still. And Quintilian's saying is relevant here, "If a citizen is assaulted, the action on outrage (*actio injuriarum*) lies; if a magistrate, the action on offended sovereignty (*læsæ majestatis*) ; if an Ambassador, the process is by war and under the Law of Nations." The principle of Retaliation does not apply here; for we know of no one who has approved or applied it, namely, that an Ambassador, coming from one who has ill-treated an Ambassador, should in his turn be similarly ill-treated. For the object of the Law of Nations is to provide for and protect not only the dignity of the sender but also the dignity of the sent.

So far concerning the Common Law of Nations and such of its heads as the plan of this treatise allows us to discuss.

LXXIII. Accordingly, I now come to speak about the Peculiar (*Proprium*) Law of Nations, which I declared above to be established among a definite number of Nations and to repose on pacts, nearly always of the express kind, and the obligation of which—reciprocally binding, as it does, those who have of set purpose instituted its rules as peculiarly expedient for themselves—is not and can not be extended to other Nations, like the Common Law of Nations. "Nearly always," I said, it is on express pacts that this Peculiar Law of Nations reposes; for it ought not to seem impossible or strange that at times some Peculiar rule of the Law of Nations should be said to be introduced among a few, maybe two, Nations by Usage, and therefore by agreement of the tacit kind. Thus, we read that not seldom suppliants and surrendered persons have been put to death, an atrocity forbidden by the Common Law of Nations (Grotius, *De jure belli ac pacis,* bk. 3, ch. 4, nn. 10, 11, 12) ; indeed, it was almost a standing custom of the Romans to kill their captured or surrendered enemies, officers and privates alike, on the day of a triumph. Yet in Greece, where the Nations were divided up into diverse States, the Law of Nations with regard to surrendered persons and suppliants was developed under the influence of a better usage; for

Arrian says of a slaughter of surrendered persons ordained by the Thebans, that it was not in accord with Greek usage, *οὐχ Ἑλληνικὴν σφαγήν*. And Thucydides likewise (bk. 3) says of surrendered persons, "It is not the usage of the Greeks to slay such." This is confirmed by Diodorus Siculus, Sopater, and others.

LXXIV. I should like to call particular attention to the fact that, while the rules of the Common Law of Nations are, in the main, hard and harsh and rigid, their severity can be mitigated in the Peculiar Law of Nations by usage or by express pacts; and not only can all inequity be removed therefrom, but also in certain matters inequity has been moderated or removed, especially among those Nations whose character Christianity, with its inculcation of the rules of Charity, has softened. (See above, section L.)

LXXV. The agreements or rules of the Peculiar Law of Nations are styled by Ulpian, Public Conventions, *Dig.* 2, 14, 5, at the end of which he writes, "A Public Convention is such as is made on behalf of peace * when generals in war arrange terms with one another." Grotius divides Public Conventions into Treaties and Sponsions or other like agreements (*De jure belli ac pacis,* bk. 2, ch. 15, n. 2). But, inasmuch as a Sponsion, though an agreement about State business, is entered into by persons who have not been commissioned or authorized by the Sovereign, we exclude it from the Law of Nations. Such Sponsions are, indeed, at times subsequently ratified by the State, and so obtain the full force of Law; yet this very thing makes them cease to be Sponsions and puts them into another category. For the point to be looked at is not so much whether the agreement is about public business or concerns, as whether it has been formed by State authority; those which satisfy this last condition are Public Conventions properly so called. In my commentary on the passage cited from Grotius, I have dealt with this fully.

LXXVI. These Public Conventions have sometimes a wide area of operation, and sometimes they are set up between very few, maybe only two, Nations; so that the Peculiar Law of Nations can be subdivided into the widely operative part (*latius patens*) and the part of restricted operation (*arctius*). In the former a sufficiently large number of Nations are associated by a common bond, in the latter a few only, by means of pacts entered into for some definite purpose. Instances of the more restricted kind can be met with in many places, and instances of the wider kind are not far to seek. For that, according to Ulpian, being a Public Convention which is made on behalf of peace, Germany affords us an excellent example of such a convention in its Instrument of Peace; for the obligation of this has a wide area of operation, affecting and restraining with its bonds not only the Estates of Germany but also the principal Nations of Europe. So, also, if that Pacification which

* Reading, with Mommsen, *pro pace* instead of *per pacem*.

is now on the anvil at Nimeguen is destined to succeed, a large number of Nations and States and Princes will be included within its obligation or law. Now here I do not want my language to be scrutinized captiously. For, although I seem to have divided the Common Law of Nations and the Peculiar into the same species, still there is a great difference between the two kinds of division. For the nature of the Common Law of Nations is such that its rules aim at securing what is expedient for many Nations, and not a utility confined to any individual State, and such that they are received, because of this common usefulness, by most or all of, at any rate, the more cultured Nations, or might profitably be so received. On the other hand, the Peculiar Law of Nations is almost wholly of such a kind that two or more Nations are reciprocally bound by it, but in regard of different affairs or services which have indeed been agreed on by common counsel and assent, but are designed to meet the peculiar needs of individual, or a small number of, Nations. Further, when I say " many Nations," that can be understood either absolutely or relatively: in the case of the Common Law of Nations, it is to be taken absolutely; in the case of the Peculiar Law of Nations, as a rule relatively. The whole thing could be made clearer by examples; but a knot must not be looked for in a bulrush (or difficulties made where there are none).

LXXVII. But by an especially modern Usage of Nations, a Public Convention about Peace can be made of two kinds, the one being Principal and the other Accessory. The Principal Convention deals with the principal end, Peace, to the extent, varying with the nature of the convention, that Peace is the concern of each of the parties. A Public Convention is of the Accessory type when each of the Nations included in the pacification receives from the others a promise of the restoration of property, and of safety and protection, after the fashion in which mutual obligations arise from a Public Convention. People of old used the Frank word *Guarantia* of this Accessory Convention, and the words *Guarentare, Guarentilare* or *Guarentizare* for extending one's authority in aid of another or taking that other under one's protection. (See Voss, *De vit. serm.,* bk. 2, ch. 20, my copy, p. 334; and ch. 23, p. 350; Lindenbrog, *Codex legum antiquarum,* on the word " *Warentem.*") It was arranged that the Instrument of Peace, just mentioned, should be buttressed by a Guarantee of this kind (see Art. 17 thereof, § " *Pax vero conclusa,*" etc). But experience sufficiently shows how frequently this protection is deceptive; and there is no point in giving here any further demonstration thereof. Again, at the present day it is not unusual for a Guarantee of this kind to be given by States that have been chosen to be Custodians of the Peace, although the terms of the Peace do not otherwise concern them, or at any rate not as principals.

LXXVIII. Of the Public Conventions between Nations, the best-known and most usual are Treaties (*fœdera*), which are entered into by the authority, good pleasure, or command of the Sovereign; so that, if they be not observed, the whole State exposes itself to Divine and human vengeance. Now these Treaties are either on Equal or on Unequal terms (*Æqualia vel Inæqualia*). Grotius deals with both kinds (*De jure belli ac pacis*, bk. 2, ch. 15). The ends and aims of each kind may be and are diverse. Thus the end may be to make a peace: of such I have spoken. Or to make a warlike alliance: these may contemplate *ἐπιμαχία*, a defensive alliance, but perhaps only so far (say) as the protection of territory is concerned, or so that help is promised for some given war or against certain named enemies; or they may contemplate *ἐπιμαχία*, a defensive alliance, of such a sort that help is promised in all wars and against all enemies—this is what Thucydides called *τοὺς αὐτοὺς ἐχθροὺς καὶ φίλους νομίζειν*, "reckoning the same persons enemies or friends." Of such a kind, in olden days, was the Achæan League, of which Polybius tells. By such a Treaty the Swiss Cantons are united, and the Provinces of the Belgian Federation. These, indeed, seem to constitute a single State, because of the force of the Treaty; but they are nevertheless distinct States. Aristotle (*Politics*, vi, p. 169) supplies the authentic principles on which to investigate this matter; so does Grotius (*De antiquitate Reipublicæ Batavicæ*). Further, Treaties are sometimes made for the benefit of trade, that it may be more safely carried on or be more profitable; we are told in *Politics*, bk. 3, ch. 6, p. 167, that there was formerly one of this kind between Tyre and Carthage. Aye, there are numerous ends which may be in the contemplation of those who are forming Treaties, as Usage abundantly confirms; and in the place cited, Aristotle, speaking about Tyre and Carthage, says there was not only a commercial Treaty between them, but also one creative of an offensive and defensive alliance (*συμμαχία*).

LXXIX. In Morals the word Duty has a wider scope than the word Law; and the two have not, or at any rate not always, the same authority and inevitableness. And in the Law of Nations, too, we find certain Duties are received, such as relate to the reception, dismissal and treatment of ambassadors, their journeys through foreign jurisdictions, their travel past any fortified place, or their withdrawal from our territory. Those skilled in such matters observe these Duties very sedulously. They all clearly originate in the practice of Nations. It is in this connection that we meet with the *Xenia* and *Lautia* which used to be given or offered to ambassadors, presents (to wit) of fish and oatmeal and, as Cato says, of the wine of honor, and other things of that kind (*Dig.* 50, 4, 18, 12; and 50, 7, 2). Of the same sort is what Thuanus records (bk. 57), namely, that the obsequies of Charles IX, King of

France, were celebrated by most of the Princes of Europe, and also at London by Elizabeth, Queen of England.

These are the authentic and principal heads of the Law of Nations. I wished only to mention them summarily; for others have discussed them in full, some topics being the subject of whole volumes. Let this suffice for this present treatise.

LXXX. Lest I be undeservedly arraigned for neglect or omission of things which intimately concern the Law of Nations, or for disappointing the readers of Hugo de Roy's little book *De eo quod justum est,* I will briefly set forth, and examine, his opinion about the Law of Nations. Now this author in many places both speaks and thinks soundly about the Law of Nations; yet when he does his utmost to defend the sayings and confused teaching of the ancient jurists concerning the Law of Nature and of Nations, he often neither speaks nor thinks soundly. The Law of Nations he ranks among Laws of human origin, saying that it has passed from time to time into the Usage and Customs of Nations because of its necessity and utility; that it differs by the whole heaven from the Law of Nature (which he calls not only, following the example of others, the Primary Law of Nations, but also, as a novelty of his own, the Ancient Law of Nations); and that it was introduced by Custom. So far so good. But nearly all the rest promotes the old chaos: such as, that the Primary Law of Nations is occupied with the first principles of Reason and with the easier and absolutely necessary moral conclusions therefrom; that the Secondary Law of Nations is occupied with the second principles and with the conclusions drawn from premises of the same order, but more difficult, auxiliary and not in themselves necessary; and other such-like things, all of which I simply dismiss, seeing that, in the light of what has been already said, the chaotic confusion can be corrected or at any rate its character be perceived.

LXXXI. I have always thought it highly absurd that Hugo de Roy should erect, as the two chief heads of the Law of Nations: First, *The Division of Things;* and second, *The Punishment of the Guilty.* Nations do indeed divide things among themselves, and these the things of greatest value, provinces (to wit) and kingdoms. But just as Division is a matter of fact, so the Law and Institute of Ownership, which is perhaps what makes Division necessary, derive their standing not only from the pacts and arbitrary decrees of Nations, but often also from the Law of Nature, as I briefly showed above, section VI. Nay, the very opportunity for this Division comes from the universal dominion conferred by God on Adam and transferred by Adam to the human race. Accordingly, as the preservation of Natural Societies is impossible without a Law of Ownership, and as the duties of justice and liberality can not be fulfilled without it, and as theft is forbidden

by the Law of Nature also, the Law and Institute of Ownership, at any rate considered universally, must be referred to the Law of Nature. See Aristotle's disputation against Plato (*Politics,* bk. 2, the earlier chapters) and Bœcler's erudite disputation, in his *Commentary* on Grotius' *De jure belli ac pacis,* bk. 2, against the poetic fiction of a primitive community of property. Others have dealt more cautiously with this topic, teaching that Nature has ordered or forbidden some things κατηγορικῶς, that is, as unconditionally and at all times to be done or left undone, but other things ὑποθετικῶς, that is, with the assumption that this or that is what men wish. Thus, that God must be worshipped is, say they, unconditionally Law and Right; but that the private property of another must not be taken away from him is a hypothetical precept, dependent on mankind's desiring the institute of private property. (Conring, *Disputatio de jure*, th. 49.) But this difference in the kinds of Natural Law I will consider elsewhere.

LXXXII. Hugo de Roy, after saying that the second head of the Law of Nations is *Punishment of the Guilty,* and after recognizing that it should more correctly be referred to the Law of Nature, tried to guard himself as follows: "In a treatise on the Law of Nations, the Punishment which is under contemplation is not that of the Natural Law but that of the Law of Nations" (bk. 1, tit. 4, at end). Then (tit. 6, n. 9) he adds, "The right to punish the guilty originates in Natural Law, and has its basis in the Rational Natural Law; while it receives its confirmation from the Law of Nations and takes its fixed and definite shape from the peculiar Law of each Nation, that is, from Civil Law." It looks as if Mevius has followed in the footsteps of this writer, for he has certainly fallen into the same error (*Prodromum,* insp. 5, n. 46). I do not wish to deal with this at any length, though there is much that might be said. Let us, however, banish the valueless hypothesis that there is one Natural Law of a simple kind, such as binds animals even, and another kind called by contrast the Rational Law of Nature. Now the right to punish the guilty is intimately bound up with Legislative power and the system of Tribunals; and these, considered generally, are rightly referred, together with the right of punishment, to the Law of Nature. That is what our author rightly does; but he errs when he limits τὸ *punire sontes,* the punishing of the guilty, to the undertaking of punitive wars, even if in such wars certain methods and results are preordained by the assent of Nations. Nor is his error less when he proposes to subsume defensive wars also under *Punishment of the Guilty.* How far apart, I ejaculate, are *Defend* and *Punish!* In such fashion do many prefer darkness to light, perplexity to plainness, and obscurity, confusion and incumbrances to the unincumbered search for truth!

LXXXIII. If the doctrine of Joannes Felden about the Law of Nations be admitted, then this Law passes afresh by the old meta-

morphosis into the Law of Nature. For he says that to the Roman jurists the Law of Nations was the capacity for juristic acts and businesses allowed to aliens, the Civil Law with its exclusion of aliens being contrasted therewith (in his *Annotations* to ch. 2, §§ 18, 19; and to ch. 8, § 1, of Hugo Grotius' *De jure belli ac pacis,* bk. 2). Pufendorf, in the place above (?) cited, maintains that this doctrine is not to be rejected absolutely; and indeed the jurist Marcian seems to favor it in *Dig.* 48, 22, 15, where he says, " A deported person loses citizenship but not liberty; and, although he no longer enjoys the special rights of a citizen, yet he has the use of the Law of Nations, for he buys and sells, lets and takes on hire, barters, lends at interest, and so on." Now, although it be true that deported persons and aliens are not, and can not be, debarred from the businesses which are dependent on the Law of Nature, as they may be from all share in the Civil Law, yet it is improper to include under the term Law of Nations matters which belong especially to the Law of Nature, and so to confuse things which are quite distinct. So we find that the doctrine under examination shelters behind a time-old error.

LXXXIV. The supreme task now awaits me of showing that there is a Law of Nations; for if none there be, I have lost all my time and trouble. Some babbler may say that I ought to have placed the discussion of this question at the beginning, and not at the end, of my treatise; for what is the use of enquiring into the contents and character of the Law of Nations before we are sure that there is a Law of Nations at all! I admit that there is some substance in this criticism, if you look at the natural order. But every branch of learning ought to be derived, not from what is in its nature better known, but from what is better known by us; and so I found it advisable to deal first with the matters referred to, in the hope that, if I removed all verbal ambiguities by classifying the species of the Law of Nations and by adopting a distinctive nomenclature therefor, and by explaining the more important heads of that Law, I should clear the way for a perspicuous presentment and understanding of the question Whether there be a Law of Nations at all, such as I have described and classified, and illustrated with various individual examples.

LXXXV. When I come to close quarters with the reasons why the whole Law of Nations is nowadays so much assailed, four chief ones present themselves, which have seduced many persons into this attitude of doubt. In the first place they think it unlikely that the Consent of all Nations ever established any Arbitrary Law among them. Next, that no sufficiently general Custom or Usage of all Nations is apparent, wherefrom the consent or tacit agreement of these Nations to this Law can be deduced or presumed. Thirdly, that Nations and Princes repeatedly profess by their conduct that what is commonly passed off as a Law

of Nations is no concern of theirs, but is a play that does not suit their stage. Lastly, that the topics which are usually referred to a Law of Nations are based in part on the Law of Nature, so that there is no need to feign an Arbitrary Law of Nations, and in part rest on no legal basis whatever. We will first weigh these arguments one by one; and when we have found how light they weigh, or naught, the truth will begin to be more and more clear.

LXXXVI. The theme of the first argument is that there is no Law of Nations, approved and established by all and every Nation. Now this I readily grant, and indeed have already granted (sections XI, XII and XXXVI), and have shown how the somewhat inaccurate modes of speech of that sort may be toned down and improved. But that there is a Peculiar Law of Nations, of the character described in sections XXIV and LXXIII, onwards, I think too clear to call for proof, and so I will not give any, lest I appear to accuse my critics of the sheer lust of dissent. For who but knows, or who doubts, that various Nations are bound to one another by the arbitrary bond of various Public Conventions? So the argument under examination simply amounts to this, that there is no Law of Nations of the type which we have called Common. But by how many rules in vogue among numerous Nations, the chief of which rules we have seen, is it made abundantly clear that, over and above the Peculiar Law of Nations, there is a Common Law, and that this is not only distinct from the Peculiar, but also, and even more, distinct from the Law of Nature! When, a little later, I shall have established this latter position more carefully, no one will continue an opposition to the Common Law of Nations, which is really no less an opposition to sense and experience.

LXXXVII. The second argument relates to the manner in which Nations have established the Law in question as a Common Law for themselves, and have come to an agreement about it. Of course, it is not suggested that all Nations met together in order to sanction that Law, but that it has been approved by the tacit consent of Nations and received by them all on grounds of a common expediency. (Vinnius, n. 2, on *Inst.* 1, 2, 1.) And just as one can seldom trace the beginnings of any law which owes its introduction to usage or custom, whether indigenous or borrowed (by inference from *Dig.* 1, 3, 20), so, and much less, will any one show the origin and development of the Common Law of Nations, dependent, as they are, on usage spread over so long a period of time and handed on from Nation to Nation. That is enough for us which is manifest in other ways, namely, that certain rules of Nations do exist and are observed among Nations as Law, alike now and in times past, albeit we can only form a probable conjecture as to their origin and the way in which they first appeared. "That," says Cicero (*De inventione*, bk. 2), "is considered Customary Law which

its long duration has shown to be approved by all without any express enactment. Among usages there are some which are unmistakably Law because of their long duration." Compare section XV, onwards.

LXXXVIII. Nor does the third argument advance the cause, for there is nothing to be got out of the reasoning: The observance of Law is often neglected, and therefore there is no Law or else it has ceased to be. I will not deny that there are some topics of the Law of Nations which can be abrogated by desuetude, either because they are not firmly settled in the usage of free Nations, and so can be easily abrogated by a contrary intent, or because they have no inevitableness to commend them; but this is subject to the proviso that the Nations which may fairly be considered affected, and whose assent in times gone by gave a sanction to the rules in question, are at one as to their desuetude and abrogation. As regards those rules of the Law of Nations which are over-rigid, Natural Equity commends the abrogation, or at any rate the mitigation, of these; and in the case of any that are manifestly unjust, this treatment is ordered by the Law of Nature, and much more by Christian piety, despite any inequitable and impious dissent on the part of others. But those rules of the Law of Nations which are void of offense and inequity, and much more those which expediency or necessity has introduced, can not be wantonly changed or abrogated by any given Nations, especially if this would enure to the hurt of the other Nations. For it is a rule of Civil Law that a society or partnership can not be quitted in any way that savors of fraud (*Dig.* 17, 2, 14); and the same rule holds even more in the society of Nations. Even if, then, any Princes or Nations, as the case may be, decline to be bound by the rules of the Law of Nations and will not have their conduct tested by that standard, that is no reason at all for depriving the Law of Nations of authority in the same way that it has been deprived of observance and its pacts deprived of good faith. For this is proof only of weakness in good faith, of an unjust cause, and of a headstrong masterfulness that insults both God and man. In cases like these, Divine Providence often interposes, to sap the strength, to place a bound to studied tyranny, and to curb the fierceness that will not suffer Law, and to visit it with punishment.

LXXXIX. The greatest force seems to remain in the fourth and last argument; namely, that there is no need of this imaginary Law of Nations, seeing that the Law of Nature alone is enough to regulate the conduct of free Nations and that some of the heads of this Law of Nations do not deserve to be dignified by the name of Law. I have already admitted that there are some rules of the Law of Nations of this sort, and I have insisted that such as are repugnant to Natural Law or Christian piety can and ought to be rejected, as being, indeed, incapable of ever acquiring any obligatory force, seeing that the supremely great authority of Natural or Divine Law prevents this. But the

question whether Nations and States are bound by no other than the Law of Nature, to the exclusion of all Voluntary Law between them, either Common or Peculiar, is one which claims our careful attention now. It will be useful to hear the words of some of those who have made this affirmation.

XC. Let Thomas Hobbes have precedence among them, for he seems to have drawn others into his way of thinking. In his book *Philosophical Rudiments concerning Government and Society* (ch. 14, § 4), he says that "The Natural Law may be divided into that of Men, which alone hath obtained the title of the Law of Nature; and that of Cities, which may be called that of Nations, but vulgarly it is called the Right of Nations. The precepts of both are alike; but because Cities, once instituted, do put on the personal properties of men, that Law which, speaking of the duty of single men, we call Natural, being applied to whole Cities, and Nations, is called the Right of Nations." Samuel Puffendorf quotes this from Hobbes in his *De jure naturæ et gentium* (bk. 2, ch. 3, § 22), and then adds, "To this opinion we entirely subscribe, thinking, moreover, that there is no other Law of Nations, Voluntary or Positive, which has the force of Law, properly so called, so as to bind Nations as if it issued from a superior." Robert Sharrock, who thought himself especially chosen for the refutation of his fellow-citizen Hobbes, nevertheless agrees with him in this matter, making profession as follows, in his *De officiis* (ch. 10, p. 129): "The Law of Nations does not seem to me to differ any whit from the Law of Nature, and I make bold to assert that no Prince will ever offend against the Law of Nations who conforms his conduct in all respects to the standard here set up by Nature." He then adds examples from treaties, embassages, and other matters of the Law of Nations, in which no one can be unjustly injured without the commission of a sin against Innocence, Good Faith, φιλαυτία, or Self-love, and Charity, which are all precepts of Natural Law.

XCI. Two things in the above call for special note. Although I freely grant to Puffendorf that the Law of Nations does not issue in the form of laws of the sort that are decreed by a superior, yet the Law of Nations does not for that reason fall to the ground. Granted that, according to the received mode of speech, Law especially means a rule of human conduct imposed by a law-giver upon his subjects, still pacts are not on that account to be barred from all Law, and not even from Law properly so called. For law-givers are no more able than Nature is to lay down a fixed rule beforehand for every detail of business and for every case. Accordingly, the same liberty that Nature has allowed law-givers of settling by a reference to the Law of Nature the matters that are not covered by their legislation, that same liberty private individuals receive from both alike, of legislating for themselves mutually

by means of such pacts as are not opposed to the Law of Nature or the Civil Laws, and of binding themselves thereby. Bœcler, on Grotius' *De jure belli ac pacis,* bk. 2, ch. 4, n. 9, as cited by Puffendorf, is even more in my favor; for he there says clearly that there is a Law of Nations, established on considerations of its utility by the free consent of Nations; and hereby he obviously marks it off from the Law of Nature. Even if, then, one free Nation is not the superior of another, and one can not lay down Law specially so called for another, yet if they choose to bind themselves by pacts, they are reciprocally bound just as if by true Law; so that, should one of them break faith, it by that very fact makes the other or others its superior so far as that they can compel it to keep faith. Now if two subjects of the same State have bound themselves by an agreement and one commits a fraud on the agreement, the other can restrain him by judicial authority and obtain redress by action at Law; in just the same way, as there is no common tribunal for free Nations, one of them may, other things being equal, resort to war as a means of compelling another, who has proved perfidious, to carry out what has been agreed on. And although the issue of war is doubtful and uncertain, yet, if the Nation that has acted up to its agreements makes war on the perfidious one, it will be in its right in so doing and will have on its side not only the other Nations who are heedful of justice, but also God Himself, the supreme umpire and arbiter of good faith.

XCII. Another matter worth remarking is that the proximate cause of the obligation of Arbitrary Law is not distinguished from the remote cause, and a window is thus opened for manifold errors. For the proximate cause of the obligation of Arbitrary Laws, strictly so called, is the will of the law-giver; and that of pacts and conventions is the free will and consent of the parties thereto. So the obligation, alike of Laws and of Pacts, is supported, as it were, on the foundations of the following rules of Natural Law: Obedience must be rendered to the Civil Majesty, and to law-givers issuing just and regular enactments; Good Faith must be observed. This I have shown more fully in my disputation *De jure arbitrario.* If, then, any one confuses the remote and the proximate causes of the obligation of Arbitrary Law, or, neglecting the proximate cause, refers all the authority of Arbitrary Law to its remote cause, he will be wiping out the whole of Arbitrary Law at one sweep and be declaring that there is only one variety of Law, namely, Natural Law.

XCIII. I can not call to mind any one who has slipped so far as this; but every one will admit how faultily the heads of the Law of Nations were promiscuously ranged by Sharrock under the Law of Nature, to the utter annihilation of the former Law. I will illustrate this by one example, which will at the same time show that there

is a distinct Law of Nations, clearly marked off from the Law of Nature. There was a very ancient treaty, made by Porsenna with the Roman People at the time of the expulsion of the Kings, which, according to Pliny (xiv, 4), provided in terms, among other things, that they should make no use of iron except in agriculture. Now who, I ask, could say that this bound the Romans by the Law of Nature? They were bound thereby through their own consent and voluntary undertaking, to which strength was added by Nature's command that faith, once given, even in a matter like this, must be observed, and the agreement not be wantonly disregarded. I do not deny that there are terms or matters in treaties and other public agreements which derive their rule and measure from the Law of Nature at the same time that the Peculiar (*proprium*) Law of Nations gives them their chief claim to be obeyed. Indeed, it may be that even to them the Common Law of Nations at times makes a contribution; yet, on careful scrutiny, it will be seen that one thing is due under the bond of Natural Law and quite another is due under the voluntary consent of Nations, unless the case be one in which the anxious care of the contracting parties has thought it advisable to bind by a twofold fetter persons whose good faith and conscience are under suspicion.

XCIV. But the classification of Hobbes, who holds that one kind of Natural Law is of Men and the other of States, the latter being commonly called Law of Nations, is obviously inept; and, unless I make a mistake, it was adopted in order to cover up the mistake of the old jurists. For diverse varieties of Natural Law do not arise from this diversity of subject; but the two varieties are essentially one and the same, as Hobbes himself seems to admit when he says that the rules of each are the same. Aye, they are the same rules of the same Natural Law, and they bind men as such whether they be united in a civil or in any other kind of society. But as it is certain that Peoples and States, as such, ought primarily to observe Natural Law in their intercourse with one another, so also Reason and Experience alike show it to be most certain that, in many of the businesses which arise between them, they accept no definite obligation from the Law of Nature, but only from their free consent and agreement. Hence another Law, of a wholly different kind from that of the Law of Nature, must needs emerge. It is unmistakable, in the Peculiar Law of Nations, that the terms of treaties and other public agreements are ordinarily such that, while Nature has left the settlement of them to the discretion of Nations, so also their origin and cause are not to be referred to any other source. Livy tells us (bk. 30) that Scipio imposed this, among other terms, upon the Carthaginians: To surrender all their tamed elephants and to tame no others. The Roman State put a stipulatory question to this effect, and the Carthaginian State gave it the promise in reply. But who will

say that Carthage was bound hereto by the Law of Nations, when the Law of Nations contained no law on the subject? Who does not perceive here an obviously free agreement and an obligation arising simply out of a pact?

XCV. The anonymous author of the *Dissertatio epistolica de principiis justi et decori* (p. 16, onwards) has the following:

"The Law of Nations is of two sorts. One sort is, properly speaking, Natural Law; but it has changed its name, because it is a Law prevailing between peoples and Nations, although it is not formally different from Natural Law. An illustration is the Law of Embassages. The other sort is formally of the type not of Natural Law but of human Law, and has been introduced by Natural Permissive Law; this is called Law of Nations because it obtains between Nations, or because it acquires the force of Law through the Usage and Custom of many Nations. An illustration is the rule that forbids poisoning missiles and instruments of war and wells, or killing by means of suborned assassins. For Natural Law allows me to injure my enemy in all ways, and to employ what means I can rely on, short of perfidy, for reducing him to subjection. Yet among more civilized peoples the rule prevails that such methods may no longer be properly employed against an enemy, lest the danger from either side become too acute. Laws of this sort can, therefore, be changed, as happens with human laws. But the first-named sort do not admit of change, because they issue, not from Permissive, but from Imperative or Prohibitive, Natural Law."

It seemed not inconvenient for me to cover up the disputation which I have entered on against Hobbes with the words of this writer; for he tells us, in his Preface to the Reader, that his primary object in that book is to support and unfold the teachings of Hobbes. But while he seems to be doing this, he straightway clears away and corrects many of Hobbes' faults. He does not, therefore, follow Hobbes in trying to demolish all the Law of Nations; but he shows that the Law of Nature, which should be much employed even between free peoples, is commonly and confusedly called Law of Nations; and he follows Hobbes in wrongly referring to this all the Law of Embassages. He rightly declares, however, that the Law of Nations properly so called is distinct from this, being based, as it is, on pacts developed by the free will and usage of Nations, and supplying a rule for those things or actions which have not received any definite form or rule from the Law of Nature. This he styles, following others, the Permissive Law of Nature, a term against which I have elsewhere protested.

XCVI. If, then, there be no rule preordained by the Law of Nature for the greater part of the businesses which free Nations enter on with one another, and yet these individual Nations can not rely on their own resources for safety, but, under the pressure of manifold needs,

feel the desirability of the services and intercourse and help and friendship of others, this very necessity links Nations together by pacts to the end that each of them may obtain its desires with certainty and constancy and that they may be mutually bound by plighted faith to render these services and this intercourse. Just as, then, Man naturally seeks Society and is driven to form it by Need, so also Nature, liberal as she is, has no intention of giving any Nation such complete and stable Prosperity that it can dispense with the friendship of other Nations; but she has with foresight so bestowed her gifts that even whole Nations and States, under the stress of Need, require the protection and aid of others. But just as that Need engenders, and often with great suddenness, the desire of various forms of good, and makes it in some cases perpetual and in others brief, so, also, the rendering of these services is enjoined not always by an Eternal Law, but rather by an Arbitrary Law. Now that Law, thus established among Nations by their own discretion, can be no other than what we are looking for, the Law of Nations. " States have need of help also against States; and on this ground many States have at times formed a society among themselves, either so as to become one State or so as to be mutually bound by treaty to render each other aid " (Mevius, *Prodromum,* insp. 5, n. 4).

XCVII. In addition we have the proof—and none better or stronger can be had—afforded by the confession of so large a number of Nations that never hesitate to appeal to a Law of Nations. For whenever one of them complains that it has been injured by another, the question is debated not always of an infringement of the Law of Nature, but of the Law of Nations. What folly it would be, then, for those who appeal to a Law of Nations, and who claim that they and others are bound by its obligation, to try to deny its operation. " The repeated appeal among Nations to the Usage of Nations is a proof of its necessity. Hence you may justifiably conclude that the Law of Nations reposes on a tacit agreement of these Nations. What we so often read of in history, namely, that peoples and princes of different States hold each other liable, and accuse each other, and are wroth with each other, in respect of the matters which we assign to the Law of Nations, this is a proof of the existence of a common bond between them " (Mevius, place cited, n. 54). Nor is it open to any one to retort that an error of name has led the Nations and myself to say Law of Nations when thinking, all the time, of the Law of Nature. For although that may sometimes happen, yet I will show, by considering with this end in view the individual heads, above set out, of the Common Law of Nations, that in general, when an appeal is made, it is made to a true Law of Nations which is distinct from the Law of Nature; for I have already shown how distinct the Peculiar (*proprium*) Law of Nations is from the Law of Nature.

XCVIII. If any State be gravely injured and redress be denied it, the Law of Nature allows it to make war even without a declaration; for by the Law of Nature he who injures another, and will not make reparation, entitles that other at once to avenge the wrong and repair the loss. And so Ælianus, in Plato, says that a war undertaken in order to ward off violence is declared not by a herald but by Nature. But by the settled order of Nations, on the other hand, it is further required that a proclamation, and this of a solemn character among many Nations, should precede. Hence the Gauls sent a herald to Rome and charged Fabius Ambustus with making war on them, in defiance of the Law of Nations, without a declaration; so Plutarch tells us in his *Numa*. (Grotius, *De jure belli ac pacis* iii, 3, n. 6.)

XCIX. There is, as I have already shown in section XLVII, a rule of the Law of Nations about the use of poisoned weapons to kill an enemy; but there is no such rule in Natural Law. And although this rule may not prevail as widely as some, still experience tells us that it is admitted on the footing of a tacit pact by the better Nations. And just as this law does not allow the poisoning of missiles, so also Nations have long ago rejected the poisoning of an enemy's wells, and such-like acts. And appeal to that same law would be made, at any rate by the more cultured Nations, should any people set about a deliberate dissemination of disease among their enemy and use that as a means of conquest. Thus, the Florentines used a machine which Italians call *Briccola* for throwing the putrifying corpses of asses and horses into the town of Sinigaglia. So did the Emperor of the Turks at the siege of Chalcis; for the machine was powerful enough to send huge millstones hurtling through the air by its discharge. And when the Bolognese were besieging Modena, they threw the corpses of their draught-cattle into the city; and as the corpse of an ass, shod with silver, happened to fall into one of the numerous city-fountains, that fountain was thereafter called by a well-known name. (Sigonius, *De regno Italiæ*, bk. 18, my copy, p. 74.)

C. Another rule of the Law of Nations is about the legality of destroying or plundering all the property of any enemy. So far, however, is the Law of Nature from granting this license, that it often forbids the practice. Another rule of the same sort is that enemy property, captured in any war—provided it be by the Law of Nations a solemn (*solemne*) war—passes into the captor's ownership. Ὁμολογία, the agreement of Nations, has given authority to this Usage, as I have shown from Aristotle (section XLIX, above). Before him, Plato (*Laws*, bk. 1) said: πάντα τὰ τῶν νικωμένων ἀγαθὰ τῶν νικούντων γίγνεσθαι, " All the goods of the conquered become the conqueror's." Xenophon (*Cyropædeia*, bk. 7, 5, 26) calls this custom νόμον ἐν πᾶσιν ἀνθρώποις ἀΐδιον, " a rule which has always obtained among all people." Brennus, in

Plutarch's *Camillus,* says to the Roman ambassadors, "You are following the lead of a most ancient rule, which gives the property of the weak to the strong." That captives in any war become the slaves of their captors, whoever these may be; That wrong-doers must be surrendered or punished; That upon the establishment of a truce, hostilities cease though the war continues; All that I said above about Postliminy —all these are rules of the Arbitrary Law which is received among Nations. "The principle of a truce was that during the stipulated interval no hostilities should occur, but that there should be an absolute rest from war, and a sort or likeness of a society set up between the parties, the violators of which were held to have violated the Law of Nations." The words are Sigonius' (*De antiquo jure Italiæ,* bk. 1, ch. 1, my copy, p. 122); and he confirms them with an extract from Livy.

CI. What has Pufendorf to say to this? "Among many people," says he, "there are included under the term Law of Nations certain usages, especially concerning war, prevalent, on the footing of tacit consent, among most Nations, or at any rate among those which claim to be considered the more cultured and humane. For even the more cultured Nations deemed it the noblest occupation to seek glory in war, that is to say, to show how far they excelled others in the daring and skill required for the killing of many by one; accordingly, a headlong rush into unnecessary and unjust wars was quite common. And the great warriors, becoming apprehensive lest their ambitious projects should arouse excessive jealousy if they employed all the license which is allowed in just war, thought it wise, many of them, to temper the atrocity of their wars with a show of humanity and magnanimity. Hence arose usages about the immunity of certain things and persons from warlike force, and about the manner of injuring the enemy and treating prisoners, and such like. Now although those usages seemed to contain an obligation arising from agreement, at any rate of the tacit kind, yet if any one who was engaged in lawful war neglected them, the only offense he was chargeable with, provided the neglect did not amount to a breach of the Law of Nature, was of a certain lack of refinement. His conduct showed that he had not ranged himself among those who regarded war as one of the liberal arts. It was like the charge of clumsiness that one gladiator might make against another who had wounded in a way not allowed by the etiquette of the arena. Accordingly, one who was engaged in a just war could carry it on by reference solely to the Law of Nature and could neglect those usages, unless some profit to himself made him prefer to observe them. And for the same reason, even he may duly obey them who wantons in unjust wars, and at least to that extent he tempers his iniquity."

CII. I do not want to cut everything down to the quick, for fear of too wide a departure from my plans. Pufendorf admits that by tacit

consent certain usages concerning war prevail among many Nations; also that these usages seemingly contain an obligation based on agreement, at any rate of the tacit kind; and yet that they can be neglected by one who is engaged in lawful war, so long as he observes the Law of Nature. This sort of writing makes it transparently plain that he consents δουλεύειν τῇ ὑποθέσει, to be a slave of his hypothesis, which is that there is no Law of Nations. For if hostilities are not regulated by the Law of Nature alone, but in addition there is prescribed for them by the tacit consent of Nations a rule which contains an obligation, a man certainly can not be neglectful of this law and yet observant of the Law of Nature, provided that these rules of the Law of Nations are not repugnant to the Law of Nature. And so, if belligerents contrive or do anything in war which is contrary thereto, others may charge them, not, indeed, with mere lack of refinement, but with injustice. Aye, so far is this injustice from being minimized by the employment of an affected word of that sort, that they rather are deemed breakers of Divine and human Law who have violated the Law of Nations. History is liberal in its supply of illustrations hereof, and I have already given some. Why, those very Nations, when they are charged with some breach of the Law of Nations, do not set about repudiating it and claiming that they are not or do not intend to be subject to its obligation; but they will rather adduce some other cases and arguments and deny that they have violated the Law of Nations. So the matter, I confess, comes round again to this point, that wars are not now undertaken and carried on with the same scrupulous regard of obligation as formerly; but this is due to the degenerate character of a few Nations and Princes, and of those too, maybe, who discern nothing wrong in offending God and man, in heaping wrong on wrong, in denying all Deity, and in postponing Law of every kind to present expediency. Of a truth, those deserve ill of the State who philosophize in such a fashion as more and more to sap the supports of the safety and well-being of Nations.

CIII. The method of giving security by means of Hostages has been received by the usage and consent of Nations. For although those Nations are in some cases entitled to security even under the Law of Nature, yet, so far as regards the manner of giving the security, whether by oath or by naked promise, whether by suretyship, or by mortgage, or by Hostages, that is matter of mere discretion.

CIV. As to Ambassadors, the situation is too clear for doubt; yet even here a dissonant note is heard from Pufendorf. In the place cited he says:

" Among the chief heads of the Voluntary Law of Nations Grotius enumerates the Law of Embassage. Our view on this topic is that by the very Law of Nature Ambassadors are inviolable even among their enemies, if they really come in the guise of Ambassadors, and not of

Spies, and as long as they do not contrive hostile acts against him to whom they are sent, even if it be that in the regular way, by means of negotiation, they seek their own master's advantage before that of another. For functionaries of this type are necessary for the making and preservation of peace, and for assuring more effectively, by means of treaties and agreements, the peace which the Law of Nature also bids us strive after in all honorable ways; and so, beyond question, that same Law of Nature contains provisions for the security of those persons who are indispensable for the attainment of the end which it has put before itself."

Forsooth, our author sees that the sacredness of the Law of Embassage furnishes an exceedingly weighty argument against himself; so he sets to work to put a different color on it and to subsume it under the Law of Nature. Now a primary injunction of the Law of Nature is, indeed, Hurt no one; but that Ambassadors who come even from enemies, and may be bringing a declaration of war from a quarter already guilty of wrong-doing, should be entitled to security so unique and solemn and far-reaching as that described by me above, this must unquestionably be attributed not to the Law of Nature, but to the deliberate choice of Nations. Further, it surely is not to be assumed that Ambassadors are sent to enemies, only for the purpose of making peace? And when they are so sent, it surely is not any rule of the Law of Nature that renders them immune from punishment for wrongs done in violation of that very Law of Nature, to the hurt of that State where they are committed? Yet that this is in accord with the Law of Nations, I have shown above.

CV. And if we look at the practice of Nations, we see that all refer this Right of Embassage to the Law of Nations which originates in their own assent. I will adduce two notable instances hereof, one from ancient and one from modern history; any one wanting more can go to Grotius and others who have devoted special books to this topic.

When Brennus, King of Gaul, was besieging Clusium, there came to him as an Ambassador, among others, Quintus Fabius Ambustus. This latter found himself unable to bring the King to his views by peaceful persuasion; so he entered Clusium and, joining the besieged in a sally, dashed to the earth a Gaul who was notably tall and well-built. " Brennus then "—the passage is in Plutarch's *Camillus* (my copy, p. 220)—" called his gods to witness how, by a violation of the Law of Nations, which was among all Nations sacrosanct, one who had come as an Ambassador had taken part in the hostilities."

For my second illustration I will use the words of Sleidanus (*Commentaries,* bk. 15):

" The King of France, who knew well enough that the Emperor would take it as a grave cause of offense, despatched a fully equipped embassage to the Electoral Princes. When the mission reached Nancy

in Lorraine, it came to a halt and waited for a safe-conduct from the Emperor; for the King, with this in view, had sent a herald in advance to Speyer with a letter for the Emperor and private messages for the Electoral Princes in which he asked for a guarantee on the public faith for the safety of his Ambassadors. When, however, the herald arrived at Speyer, clad in the customary garb of state, he is stopped by Granvallanus, and he hands him the letter written by his King to the Emperor, for he could do no other, explains the motive of his journey, and begs for the Ambassadors, who were then at no great distance, the protection due by the Law of Nations. He is ordered to stay in his quarters, and a watch is put to see that none approach him for parley. Then, on the fourth day, he is dismissed with the following very rough speech: 'That he had acted very imprudently and had run a great risk of losing his head, in daring to come there; for the King, being an enemy of Germany, had no business within the boundaries of the Empire, and no Law of Nations was shared with him. Let him go back home and report this to his King. There was no ground hereafter for the approach of himself or any one else, his present act being condoned and overlooked more by the Imperial clemency than for his deserts. But let him beware in future, otherwise punishment awaits him; for he has acted contrary to the law of heralds, having no right to approach the Emperor's residence save by his permission. As to the letters which he says he carries, the King has so deserved of a Christian State, and especially of Germany, that in this state of things the Emperor neither would nor ought to receive them, lest the King's wonted manner of writing and promises should entrap either the Emperor himself or others.' This answer was given to the herald, written out in French. And so he was sent back, with the King's letters to the Emperor and the Princes, under an escort of cavalry which conducted him as far as Nancy. And when the Ambassadors heard what had happened, they were in great straits and extremely anxious about their safe return home. But after conferring with Antony, Prince of Lorraine, they left somewhat secretly by night and returned to the adjoining part of France."

There is much here that is noteworthy in connection with the received Law of Nations about Ambassadors and Heralds. These points must undoubtedly be taken as belonging to the Law of Nations, properly so called; they can not be referred to the Law of Nature, except at the cost of thinking so unjustly of the Emperor as to make him deny to the King any share with him in the Law of Nature. Although, then, I will not deny that Ambassadors on occasion and at times are provided for by the Law of Nature, yet I hold that far the most usual provision for their security, dignity and immunity is found in the arbitrary rules of Nations.

CVI. I will lastly add yet another example; and I doubt whether than it there is any more convincing and clear proof of the existence and

operation of the Law of Nations; it is so obvious and of such daily repetition that I am surprised that, as far as I know, it has not occurred to those who have so assiduously sought proofs elsewhere. It is notorious that men, whether we regard those who live in some one State or men generally who live in many different States, require a various interchange of commodities and commercial dealings, for no one land produces every sort of thing. Now there being such a variety of commodities, they must be compared one with another and a standard be erected for measuring their respective values, if any dealings with them are to be justly and properly carried on. *διὸ πάντα συμβλητὰ δεῖ πως εἶναι, ὧν ἐστιν ἀλλαγή*, " Accordingly, if things are going to be exchanged, they must be of a kind which admits of a common standard of value," says the Philosopher (*Nic. Eth.* v, 5, § 21). Seeing that Society between men can not exist without commercial intercourse, and that this can not be carried on unless values can be equated, and that this involves a common standard of value and the comparison of one commodity with another, etc.—that is the kind of *sorites* which Aristotle drew up on the matter (place cited, § 45).

CVII. Now elsewhere things which, in their nature, are *σύμμετρα, συμβλητά*, measurable and comparable, with one another ought to be of the same kind and resemble one another, just as *ὁμογενεῖς*, things belonging to the same genus, do, and just as, in point of number, is the case with each and every cipher, and, in point of size, with each and every figure; but in the case of exchangeable commodities we have things which, from this point of view, are not com-mensurable, being *ἀνομοιογενεῖς*, in genus and in nature very unlike one another. But from the standpoint of human use, the furtherance of which is the concern of commerce, these things, however unlike in their nature, admit of measure and of being equated with one another. On this point, this is what the Philosopher says (place cited, § 46): " Things so unlike one another and so disparate can not, to speak truth, be brought into relation by any common measure; but from the standpoint of need and usefulness it can easily be done." And further, he deduces from this the necessity of a common measure of things which, in regard of human use, whether more or less necessary, are so diverse (place cited, §§ 27, 47).

CVIII. This common measure is twofold: the one is natural, namely, Demand; the other comes from human agreement and institution, namely, Money. Aristotle thus describes the former (place cited, § 27): " There must, then, be some one thing which measures all the others. And this is in truth the Demand for mutual services which holds Society together. For if men wanted for nothing or not in the same way, there would be no exchange or none of the same kind as now." By this he means that the commodities which admit of human commerce, of whatever sort they are, are not estimated, and therefore are not classified as

regards value, by reference to their natural worth; for, were that so, says Thomas Aquinas on this point, the mouse as a sentient animal would have to be preferred to the most lovely pearl. But the estimate is made in correspondence with the greater or less want which man has of these things, whether it be necessity or luxury that stimulates that want. That this is precisely so is proved, adds the Philosopher, by the fact that if want disappears on one side or on both, men no longer traffic or exchange with one another.

CIX. Men of earlier times, before the invention of money, employed simple barter, a system which labored under more than one inconvenience. Among other defects there was this, that the coincidence of my wanting what you had and my having what you were willing to take, was not always present nor easily arranged (*Dig.* 18, 1, 1). This hampered commerce in many ways, and wants had very often to go unsupplied. In order, then, to obviate all these difficulties of the old system of barter, and that commerce might fitly and conveniently develop in accordance with the various needs and wants and desires of every man, a second measure next appeared, a product of human institution and decree, money, whereby men could with precision state the value of things, and which they could use as an admirably adapted instrument of commerce, and thereby all the more expeditiously provide for their necessities. Hence Aristotle says (*Politics* i, 6, pr., my copy, p. 34): *τὸ νόμισμα, στοιχεῖον καὶ πέρας τῆς ἀλλαγῆς ἐστι,* " Money is the beginning and the end of exchange."

CX. It is quite worth while to hear Aristotle discourse more fully about the origin of Money. In *Politics* i, 6, p. 31, he writes thus:

" When the advantage arising from this (that is, from exchange) was carried further by the import of what men were in want of and the export of what they had in abundance, the employment of Money necessarily arose. For it was not an easy thing to bring together from different places all the natural necessaries of life. Wherefore, for traffic of this kind, men arranged to give and receive mutually some agreed-on thing, which, while it was itself a commodity, was practically easy to handle in the business of life, some such article as iron and silver, and anything else of that sort. To begin with, it was simply defined by size and weight; but later on, by some imprinted mark which saved them the trouble of weighing, the mark being placed as a token of quantity."

So our Philosopher first shows the causes by which men were not so much led as driven to adopt the employment of Money, that ancient system of barter being so involved with grave difficulties that it did not satisfactorily supply men's needs. These causes I have clearly explained elsewhere. Next he shows how Money took the place of Demand and how by it, just as by Demand, men were able to measure very different values of different things. " Money brings things which are quite dis-

parate into a harmonious relation by means of a suitable comparison and collocation; for there is nothing the value of which Money does not measure" (*Nic. Eth.* v, 5, §§ 48, 49). And (*Nic. Eth.* ix, 1, § 3) κοινὸν μέτρον τὸ νόμισμα, "Money is (called) a common measure." And χρήματα λέγομεν πάντα, ὅσων ἡ ἀξία νομίσματι μετρεῖται, "We call Wealth everything the value of which is measured by Money" (*Nic. Eth.* iv, 1, § 4). And because Money in this matter takes the place of Demand, τὸ νόμισμα, Money, is called by the same philosopher ὑπάλλαγμα τῆς χρείας, "the successor and representative of Demand."

CXI. And in order that Money may the better fill this position and perform the function of assessing values, it must be made of a suitable material. Not every material will suit, however great value men may have put on it. And so precious stones and pearls can not be used as Money; but some material is wanted which can be struck, and drawn, and fused, and fashioned into as many parts as are necessary to measure with absolute precision all the different values, and so that the smallest coins, when enough are taken, are equal to a coin of high denomination, and to its value. The metals, then, are most suitable to be melted into Money; and they seem to have taken their name therefrom, as being extremely well adapted for μεταλλαγή, *metallagé,* Barter. (Petrus Victorius, *Commentaries* on cited chapter of *Politics.*) And among the metals, the rarer and more precious ones are eminently useful for this purpose; for they do not become worn out and valueless by loss of material, and they are commended above the rest for an internal goodness, as it is called. Money ought, indeed, to be οἷον ἐγγυητής, like a surety, making him who receives it, in consideration of value given, secure that he will receive at some other time, in return therefor, either the same thing or something else of the same value. (*Nic. Eth.* v, 5, § 38.) The rarer, then, and more precious the material of Money is, the better it can fill the place of a surety and give assurance to the receiver. Now of all the metals gold easily holds first place for the purposes of Money; and so when Antony, in contempt of Nature, put gold to a vile use, he was judged by Pliny to deserve proscription (bk. 33, ch. 3).

CXII. This being premised, we will get a little closer to our purpose, which is to find out by whom and in what way Money has been made a measure of value and the employment thereof become current. This has now been briefly indicated and now calls for fuller explanation. Aristotle (*Nic. Eth.,* place cited, § 29) discourses as follows on this topic: τὸ νόμισμα γέγονε κατὰ συνθήκην. καὶ διὰ τοῦτο τοὔνομα ἔχει νόμισμα, ὅτι οὐ φύσει, ἀλλὰ νόμῳ ἐστί, καὶ ἐφ' ἡμῖν μεταβάλλειν καὶ ποιῆσαι ἄχρηστον, "Money was begotten by an agreement and understanding. And it is called νόμισμα from νόμος, because it prevails, not by nature, but νόμῳ (by convention, that is, by human institution). And it is open to us to change it and make it useless." And a little later, after saying that some one

thing is required, to act the part of a measure and give precision to the values of everything, he says that this thing is Money ἐξ ὑποθέσεως, that is, by human institution and arrangement (§ 47). [Argyropolus gave as a translation of that Greek word, the Latin *ex positione* (*sc. hominum*), which is better than *hominum instituto et ex conditione.*] With these texts that cited from *Politics* i, 6, is in agreement; it is relevant here and runs: τοιοῦτόν τι συνέθεντο πρὸς σφᾶς αὐτοὺς διδόναι καὶ λαμβάνειν, "They arranged mutually to give and to take the agreed-on thing of this kind," to serve as an instrument for the exchange of commodities and for the carrying on of commerce.

CXIII. It appears from the foregoing that the employment of Money was adopted not inside one family or a few families, nor between the frequenters of one trading-center, or the citizens of one city or State, but among as many free Nations as were thoroughly weary of the difficulties of the former system of barter, and so had embraced this easier and more expeditious mode of traffic. For it is well known that commerce is in vogue not so much between the men of one trading-center or city as between different Nations and the citizens of [different] States. Hence the Philosopher (same chapter 6, my copy, p. 31) says that those persons made especial use of barter who lived far apart from one another, ὧν κατὰ τὰς δεήσας ἀναγκαῖον ποιεῖσθαι μεταδόσεις, "reciprocally supplying each other's varying needs." And shortly afterwards he adds, καθάπερ ἔτι πολλὰ ποιεῖ καὶ τῶν βαρβαρικῶν ἐθνῶν κατὰ τὴν ἀλλαγήν, "as many of the barbarous peoples still do in the case of barter."

Now the very best translation of Aristotle's συνέθεντο (section CXII, at end) is that given by Joannes Genesius Sepulveda, *Publico gentium consensu constitutum est,* "It was arranged by the public consent of Nations."

CXIV. The foregoing throws light on the whole of *Dig.* 18, 1, 1, and especially on some words therein. Thus, in this Law it is said that a certain substance was chosen for Money which had a permanent value assigned to it *by public authority,* with the view of obviating the inconveniences of barter by means of its constant arbitrary value. Now, if you look at the nature and origin of Money, you find that, just as its employment was adopted at human discretion, so also it can as freely be repudiated and set aside; yet, if what you look at is the end and advantage of the employment of Money, you find that nothing is so conducive to the welfare of commerce as the *permanence,* so far as that can be secured, of the value of Money; and, similarly, nothing is so disastrous to it as a frequent change in that value. So we find that there are more frequent changes in the value of wares and commodities than in the value of Money. For this purpose, recourse to the public authority of the Sovereign is necessary, that it may fix the amount of any kinds of Money which shall fitly represent a given value. This amount, in the olden

days when coins, being yet rough and, as Thucydides calls them, ἀσήμα, unstamped, were brought to the test of the balance, they used to determine by weight; and that explains why the syllable *pens,* meaning *weighing,* still occurs in *impensæ, expensæ* and other Latin words of that kind. (Pliny, bk. 33, ch. 3.) When, however, the employment of Money became increasingly general and was adopted as the ordinary course by men and Nations, a mark or stamp was in time impressed on the coins by public authority, serving as a proof and badge of amount or value, so that traders were freed from the annoyance of having to weigh. Silver was at that time *signatum,* Thucydides' ἐπίσημον, *minted.*

CXV. Although, then, the jurist Paulus, in *Dig.* 18, 1, 1, may seem to have meant by his word *publica* that the assignation of value must be by public authority in the way just described, still I am quite convinced that he meant more than this, namely, a requisite of Money is that the amount and value in question be approved by the public assent and usage of Nations, or be capable of being approved, if not all at once everywhere, then at any rate by degrees. For commerce is not limited to the bounds of a single city or district, but reaches out into all Nations and Peoples; and so, if Money is to serve the purposes of these Nations in all parts of the world, its validity must rest on the approval and public assent of Nations. Accordingly, when Theodorus Zwinger, in his *Theatrum vitæ humanæ,* had told when Money was first coined at Rome, he added, " It thenceforward began to be coined all over the world and to be common "—that is, in the practice and varied business relations of the free Nations who, directly Money was invented, eagerly employed it and adopted it as a measure of value and a medium of exchange.

CXVI. Now as to the manner in which Money passed into the general use of Nations, the Philosopher is explicit in the assertion that this was done κατὰ συνθήκην (*by a pact or arrangement*) of the Nations, or ἐξ ὑποθέσεως (literally, *by hypothesis*). This last term Zwinger (*Annotationes ex Mathematicorum disciplina*) explains as follows: Just as the word ὑποθέσεις, *hypotheses,* is applied to those statements which people postulate, or claim should be conceded as true, so, he says, it is a ὑπόθεσις of men and Nations that Money ought to be the measure of all commodities; that is, this is settled by a concession or agreement or common assent of men, and that function is attributed to Money because men have mutually made this resolve and concession. In just the same way, then, that so many other laws and institutions have been received among Nations, so did this rule about the employment of Money arise: to begin with, it took shape in some sort of pact; then one Nation after another soon imitated it, not only internally, each in its own State, but externally with other States; so that gradually, by a tacit agreement, the employment of Money was adopted by nearly all or by the majority of Nations. In the result, I doubt whether any more striking example of a law and

institute of Nations could be given, to prove that Law of Nations and at the same time to show exactly how those institutes are spread abroad and acquire the authority of Law, which, growing up in continuous usage, are confirmed by a tacit agreement and bind even free Nations with the bond of their obligation.

CXVII. I will illustrate this by one kind of coin. It is well-known that ducats pass current in anybody's hands; and it is said of them that they were first struck in Italy. For the Emperors at Constantinople (the Western line being now extinct), or else their Exarchs at Ravenna, placed Dukes over the cities of Italy; and those Dukes began the use of gold pieces which took their name, ducats, from that fact. Some attribute this kind of coin to a Duke at Rome, others to one at Venice, namely, Joannes Dandolo, the claim of the former in this competition of honor being championed by Hieronymus Rubeus (*History of Ravenna* iii, p. 176, onwards), and the claim of the latter by Joannes Nicolaus Doglionius, in his *Venetia triumphans et semper libera.* That coin not only met with approval everywhere in Italy, but in imitation of it many ducats were struck everywhere in Germany, and in Belgium, Denmark, Sweden, Poland, Hungary Transylvania and even in the Turkish Empire; indeed, we put the Turkish ducats, stamped with Arabic characters, before almost all others, and their employment is very common in Europe and Asia and Africa by the agreement of numerous free Nations.

And if you look into the travels which have been undertaken to the most distant lands and peoples of America and elsewhere, and search the histories of these, both ancient and modern, you will find that all over the world, with ready assent, the employment of Money has been gradually adopted.

CXVIII. And there is no ground for any objection on the score that Money has nevertheless often been repudiated by peoples, or that the sale of wares has been refused despite the offer of Money of a sort which left nothing to be desired. For as regards the first of these two points, there are many ways in which it can happen that Money is rejected by peoples without impropriety, because, say, in quantity or quality it is not up to its face-value or because some unexpected change or other drawback has happened to the Money, so that it is no longer fit to perform the function of a surety. And as regards the second of the two points mentioned, it may also happen that commerce is not improperly refused, although coins are offered in which there is no flaw. For if the owners of the wares may want them themselves, they have undoubtedly a stronger claim, and they can not be compelled to sell their wares against their will. Or again, although the owners may not themselves need them, yet their Prince or State may; and these are fully entitled to forbid their subjects to sell their wares or export them abroad,

and to refuse to let foreigners buy and export them. And I need not add that there may be some men, and some peoples also, who render themselves unworthy of commerce in any commodities, or in some. If, then, practical limits (*termini habiles* *), as the common saying runs, be fixed, and you remove from the sphere of Money and commerce those things which only approach it by chance or by accident, at any rate generally and among most Nations the employment of Money obtains by their agreement, to serve as a measure of value and an instrument of commerce.

CXIX. As, then, all Nations with one mouth call for these and similar rules, and give assent to them, and individually acknowledge that they are bound by them, it is indeed rash to try to sever this bond as those would do who impugn this Law of Nations. The teaching of these persons is fraught with grave danger to public safety; and this throws out in relief the excellent zeal for the public safety, and the sound intelligence, of those who have before this date given to Nations, States and Princes the following advice and suggestion, namely: To erect of their own motion, by common agreement, a College of Fecials wherein, as a necessary first step, controversies which have arisen between States should be cognized and argued and decided, in such sort that nothing save necessity would open the way to war, it being undertaken only against those who have declined to obey a judgment rendered, or who in other ways have shown contumacy towards the authority and decrees of this College. To many men of sound intelligence this idea may seem a good one—yet, if you look at the times and at the tone of to-day, a matter for mockery. Now many philosophers and historians have shaped the ideal State or the ideal Prince after the idea in their own minds, and have found their imitators, up and down, who have borrowed their teachings for the use of their own State to its great profit; but the idea I have mentioned is not of the same brand as Plato's Communion of Property, though it may not impossibly be considered to be such; and its utility would be unsurpassed.

CXX. But if the attempt to convert all Nations, or most of them, to this idea fail, at any rate it ought to be all the more commended to Christians, in proportion to the stringency of the Saviour's injunctions to His followers to live in peace and charity. Let each Christian Prince, then, choose to do that which they say was done by Henry IV, King of France, than whom no one was readier in wit and with hand. And if their choice so falls, why should they not adopt this same institution, which is within their discretion and power? For they who are at the head of Governments ought to be most observant of Justice; and the more diligent their pursuit of Justice is, the more willing they will be to adopt this plan and suggestion. But those who are led by ambition, or

* This must be the Latinization of some current German saying.—TRANSLATOR.

greed, or the lust and insolence of power, and other vices, to deem the dissemination of war and the effusion of the blood of slaughtered men matter for jest, and glory, and display of power, will in no wise approve this project; for it would not serve the purpose of those who want to do hurt without suffering hurt. Could we imagine this plan adopted, the stronger would not oppress the weaker; for he would admit that God and Justice are above him. And so far would it be from diminishing the power and dignity of any King, that it would rather add to his renown and magnanimity; and the weaker would not always be suspecting and dreading the strength of the stronger, nor would the support of the soldiery and army continue, by its costs and charges, to drive the subject into the depths of poverty. Strifes and hatreds, and such-like plagues, would then either cease or at any rate not burst into bloody war so readily; while, for the extirpation of sloth and cowardice, there would remain other remedies, and these more suitable and of the utmost advantage to the Christian world.

CXXI. But if this is beyond reach and hope, I would that the happiness and tranquillity of at any rate the German peoples should touch the highest pitch that I can either plan or wish. "For I leave this to be pondered over, whether each of the Princes of Germany is not setting up a separate State of his own, so that the whole Holy Roman Empire is not really one Commonwealth, however many points its several members may have in common. I leave this," says Conring (*De pace perpetua inter Imperii Ordines,* § 2, concl. 17), "for others to ponder over." (Add thereto Bachov on Wesenbec, *In quibus causis pignus vel hypotheca tacita contracta,* n. 5.) However that may be, the tendency increases for the Estates of the Empire to split into separate parts. Every day makes this clearer to the next day. For the more each fancies itself a Commonwealth and endeavors to shape and develop itself into the likeness of one, the looser-jointed must the fabric of the whole Empire become. Germany has experienced this most serious calamity in days gone by, and experiences it now. In the hope of curing it, a supreme tribunal was erected a little while ago, and another one just recently, and some extremely salutary and wise Sanctions and Laws have been added to them. Still, the Estates do not seem persuaded yet that what suits the swarm suits the bee also; nay, some of them not only withdraw from the community of the Realm, in reliance either on their own or on another's military strength—even, indeed, in some cases, on that of a foreign power—but they also often draw the enemy into the vitals of the Realm, without ever bestowing sufficient heed and care upon the public safety and tranquillity. So much the more praiseworthy are the efforts of those distinguished members of the Imperial Council who are indefatigably devoting all their energies and resources to the aid of the Empire in that quarter where the chief peril lies.

Polybius (bk. 4) tells us, of the Ætolians, that they "knew no laws either of peace or of war, but in both times carried out all their plans in defiance of the Law of Nations and all human institutions." But of the Achæans the same writer, who in Cicero's judgment was second to none, says (bk. 2):

"Within our memory they have made astonishing progress, owing to their internal harmony. Many persons had previously tried to persuade the Peloponnesians to join in common counsels for the good of all; but none had met with any success, because each of them was bent, not on the defense of the common freedom, but on the establishment of his own supremacy. But in our own day there has been such a great development in this matter—or rather it has reached such a pitch of perfection—that the Peloponnesians have not only cemented a friendship by means of a treaty of alliance, but they also have one and the same system of laws, and weights and measures, and money; and, further, the same magistrates, senators and judges; in a word, there is only one thing wanting for almost the whole Peloponnese to be reckoned a single city, and that is, that all the inhabitants do not dwell within the circuit of the same walls. Other things are identically the same among them, both for the whole league and in the individual cities."

A little later on, that prince of historians recounts how the Achæan States, by the display of good faith and the adoption of sage counsels, laid the ills by which they were harassed. For they ever had but one mode of administering State affairs; and this was one which served as an incitement to that equality and liberty which flourished among them, while they made continual war on any who, in reliance either on their own strength or the help of the Kings, would keep their States in subjection; and they reduced all these to terms.

A twin to this Achæan League is the League of the Swiss Cantons; so is that which obtains in the seven Belgian Provinces. All these had similar beginnings, but the developments in the case of the last-named were greater. About the issue and end of them I will add nothing, except that similar results must be feared from similar causes.

The celebrated Gothofredus has likened our Imperial Commonwealth to the Achæan League, on the assumption that its members are bound by a similar bond. Whether this be exactly so or not, the question remains whether, avoiding the anarchy of Ætolia, and in the highest interests of the Empire and each of the Estates, a College of Fecials should be erected, to whom, by such legislation as our circumstances may suggest, there can be entrusted such matters as relate to peace and war, and the preservation of our common polity against the machinations of internal and external foes. This question is for the councils of our wiser ones: to them, with my commendation, I leave it.

Glory to God alone.

INDEX OF AUTHORS CITED.

[The form of the names listed below is that which each name would have in the individual author's own language, unless it is doubtful what this would be (in which case the Latin form is retained) or unless there is a well-recognized English form. The reference is to the page of the translation.]